Applicant Details

First Name	**Jacqueline**
Middle Initial	**L**
Last Name	**Barkett**
Citizenship Status	**U. S. Citizen**
Email Address	**jbarkett22@gmail.com**
Address	**Address** Street **500 West 21st Street, Apt 2B** City **New York** State/Territory **New York** Zip **10011** Country **United States**
Contact Phone Number	**8583494315**

Applicant Education

BA/BS From	**University of Southern California**
Date of BA/BS	**May 2009**
JD/LLB From	**Fordham University School of Law** **https://www.fordham.edu/info/29081/center_for_judicial_engagement_and_clerkships**
Date of JD/LLB	**May 18, 2015**
Class Rank	**33%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**No**

Bar Admission

Admission(s) **New York**

Prior Judicial Experience

Judicial Internships/ Externships **No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Greenberg, Karen
greenbergkarenj@gmail.com
6462933929

Tucker, Richard M.
RTucker@usa.doj.gov
(718) 254-6204

Palazzo, Joseph
Joseph.Palazzo@crm.usdoj.gov
202-445-7910

This applicant has certified that all data entered in this profile and any application documents are true and correct.

The Honorable Eric Vitaliano
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

March 18, 2022

Dear Judge Vitaliano,

I am writing to apply for a clerkship in your chambers beginning September 1, 2023 and ending September 1, 2024. I am a 2015 graduate of Fordham University School of Law where I was a Stein Scholar and a member of the Brendan Moore Trial Advocacy Competition Team. Presently, I am clerking for Magistrate Judge Katharine H. Parker. Prior to that, I was a Special Assistant United States Attorney for the Eastern District of New York in the National Security and Cybercrime section.

Upon graduation from law school, I joined the National Security Division in the U.S. Department of Justice through the Attorney General Honors Program. During my four years with the Department, I was fortunate to practice in two Federal District Courts and in the Executive Office of the U.S. Department of Justice's National Security Division as Counsel to the Deputy Assistant Attorney General. My time with the U.S. Department of Justice coupled with my exposure to the legislative and executive branches via my internships at The White House, the U.S. Senate, the U.S. House of Representatives and the Senate Foreign Relations Committee allowed me to appreciate the complexities of criminal prosecutions.

As a Trial Attorney and a Special Assistant United States Attorney, I worked on national security cases, which are heavy in criminal enforcement, regulation, and punishment. Working alongside my counterterrorism partners made me fully appreciate the gravity of taking away a person's freedom or even life, but I believe a crucial experience that I need is to sit side-by-side with a member of the judiciary and absorb all of the wisdom they have to impart in criminal cases. Clerking with the Honorable Katharine H. Parker has been such an invaluable experience, that I want more. I am seeking another clerkship that exposes me to more areas of the law with a focus on my writing and research, with more exposure to criminal cases as opposed to civil matters. As your clerk, I would work tirelessly to help craft judgments, review sentencing's and research case law, and having my work reviewed by a thoughtful leader in the judicial system would be an incredible opportunity to improve as a lawyer.

Attached please find my resume, writing sample and transcript. In addition, I provide the following references:

1. Professor Karen J. Greenberg, Fordham University, (917) 861-8602;
2. Richard M. Tucker, Chief of the National Security and Cybercrime Section, U.S. Attorney's Office for the Eastern District of New York, (718) 254-6204;
3. Joseph Palazzo, Trial Attorney, U.S. Department of Justice, (202) 445-7910.

Thank you for your kind consideration of my candidacy.

Sincerely,

Jacqueline Barkett Chervak

JACQUELINE L. BARKETT
(858) 349-4315 | jbarkett22@gmail.com

EDUCATION

Fordham University School of Law, *Juris Doctor* (GPA: 3.3) May 2015
Stein Scholar, Center for Public Interest, Head of Veterans Project
Archibald R. Murray Public Service Award Magna Cum Laude (2015)
Head Assistant to Director Karen Greenberg, Center for National Security Law
Georgetown White Collar Crime Competition Finalist, Brendan Moore Trial Advocacy Competitor

University of Southern California, *Master's Degree*, International Relations and Public Diplomacy May 2011
Thesis: Public Diplomacy and Counterinsurgency Operations in Afghanistan, Khost Province
Los Angeles World Affairs Council Member
Member of Association of Public Diplomacy Scholars
Honorary Speaker, Media and Terrorism Conference in Dublin, August 2010

University of Southern California, *Bachelor of Arts*, Communication, Minor in Mandarin Chinese May 2009
Dean's List Honors, USC Annenberg's School for Communication
Phi Sigma Theta Honor Society

LEGAL EXPERIENCE

The Honorable Katharine H. Parker, U.S. District Court for the Southern District of New York Apr. 2021 – Apr. 2022
Prospective Judicial Law Clerk

Federal Reserve Bank of New York, New York Feb. 2020 – Apr. 2021
Risk Analyst in the Financial Crimes Unit for Compliance/ Legal Group

- Investigated suspicious wire activity including money laundering, sanctions evasion and fraud.
- Wrote and researched country-specific reports (mostly based in the Middle East) regarding anti-money laundering policy and exchange houses in Arabic.
- Completed due diligence research using various databases (including World-Check, SARS, and Lexis Advance).
- Provided written and verbal reports on analysis and research related to the above.

U.S. Department of Justice

Special Assistant United States Attorney, U.S. Attorney's Office, Eastern District of New York Feb. 2018 – Dec. 2019

- Represented the United States in district court and grand jury.
- Examined witnesses in grand jury and in court; argued at sentencing, detention, and supervised release violation hearings; and presented cases for indictment. Prepared witnesses for trials and hearings.
- Conducted investigations and prosecutions of money laundering, wire fraud, sanctions-based violations, public corruption and terrorism, including obtaining search and arrest warrants, negotiating plea agreements, and drafting briefs for trials and motions.
- Led two filter review teams regarding visa fraud and terrorism investigations.

Counsel to the Deputy Assistant Attorney General, U.S. Department of Justice Nov. 2016 – Feb. 2018

- Counsel to the Deputy Assistant Attorney General For National Security overseeing the Counterterrorism and Counterespionage Sections within the National Security Division.
- Analyzed every search warrant, indictment, complaint, plea, and other pleading from the 94 U.S. Attorney's Offices who were investigating a subject of national security.
- Provided confidential, high-level legal and policy support for the NSD AAG and DAAG on complex and highly sensitive national security programs and coordinated meetings with our intelligence partners.
- Assembled and led a team to investigate cold cases.
- Prepared data for Congress regarding terrorism investigations.

Special Assistant United States Attorney, U.S. Attorney's Office, Washington, D.C. Apr. 2016 – Aug. 2019

- Completed twelve bench trials and managed over sixty cases in Superior Court.
- *United States v. Kassim Tajideen,* member of the trial team on a complex IEEPA, wire fraud and money laundering case where I drafted motions, wrote prosecution memos, questioned multiple witnesses in the grand jury, reviewed extensive discovery of over three million documents, traveled internationally for proffers, coordinated with law enforcement domestically and internationally, participated in court hearings, and interviewed witnesses in Arabic.

Trial Attorney, U.S. Department of Justice, National Security Division Sept. 2015 – Apr. 2016

- Attorney General's Honors Program in the National Security Division's Counterterrorism Section.
- Reviewed complaints, indictments, plea offers and classified information with our intelligence partners.
- Wrote briefs for court filings and assisted AUSA's with investigation.

LEGAL INTERNSHIPS

U.S. Department of Justice

Legal Intern, National Security Division Summer 2014

- Wrote memo about the standard of review for appellate courts review of FISC rulings for an Eighth Circuit appeal.
- Drafted monographs on juvenile cases and electronic searches at the border.
- Managed hostage cases in Syria, Lebanon and Iraq.

Legal Intern, U.S. Attorney's Office, Eastern District of New York Spring 2014

- Worked in the Civil Division, Human Rights Section.
- Research and assisted in cases regarding retaliation claims and economic fraud.

Legal Intern, U.S. Attorney's Office, Southern District of New York Summer 2013

- Criminal Division intern in the General Crimes and International Narcotics and Terrorism Section.
- Assisted in a narcotics trial; Reviewed Arabic interrogation videos; Drafted reply to a Bill of Particulars.

POLICY EXPERIENCE

Carnegie Endowment for International Peace Middle East Center, *Intern*, Beirut, Lebanon Jan. 2012 – Aug. 2012

- Wrote, edited and sourced papers on the Syrian crisis for government agencies.
- Planned an international conference in coordination with TESEV in Istanbul, Turkey for Middle East leaders and officials.
- Attended the Arab League Summit in Iraq.
- Worked with media counterparts to develop stories about Lebanon vis-à-vis the Syrian crisis.

U.S. Department of State, *Political Affairs Intern*, Rome, Italy May 2011 – Nov. 2011

- Worked at the U.S. Embassy in Rome Italy with the U.S. Mission to the United Nations Food Agencies.
- Drafted and edited speeches for the Ambassador to the United Nations Food Agencies for speaking engagements.
- Created and implemented a social media scheme for the U.S. Mission to provide aid for the Horn of Africa famine.
- Delegate to the U.S. Mission to the U.N. for the election of the new Director-General of the Food and Agriculture Organization (FAO).

Center For Public Diplomacy, *Research Assistant*, University of Southern California Aug. 2010 – May 2011

- Researched Public Diplomacy of Non-State Actors in the Muslim World: Hezbollah, Hamas and Al Qaeda for Dr. Lina Khatib, Director of Stanford University's Arab Reform and Democracy Program.
- Analyzed national media websites and blogs in Arabic; drafted reports and researched summaries relating actions of non-state actors to broader communication theory.
- Recognized in Lina Khatib's book, Image Politics in the Middle East.

The White House, *Office of Presidential Correspondence Intern* May 2010 – Aug. 2010

- Developed and implemented a new organizational and logistical system to respond to mail backlog; led a team that recruited and managed volunteers.
- Managed departmental operations, response customization, data entry, daily reporting and quality control.

Project Concern International, *Board Member and Volunteer*, Lusaka, Zambia July 2009

- Led community-level interventions with KidSafe, collaborated with local schools, and facilitated focus groups with volunteers to evaluate effectiveness; generated training materials for women to learn micro-financing.
- Hosted classes informing people about public health sanitation education pertaining to HIV/AIDS.

AWARDS

- Criminal Division Assistant Attorney General's Award for Distinguished Service December 2019
  - Awarded to recognize superior performance to the Criminal Division in *United States v. Kassim Tajideen.*
- Award from the Federal Bureau of Investigation's New York Joint Terrorism Task Force July 2019
  - For the successful prosecution of Mohammed Naji during Operation Fare Game.

ACTIVITIES & INTERESTS: Extensive travel (76 Countries); Certified Falcon Hunter (Trained in Ireland); Order of Malta
LANGUAGES: Proficient in Arabic
CLEARANCE: Top Secret / SCI

Jacqueline Barkett
Fordham University School of Law
Cumulative GPA: 3.3

Fall 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Law	Abner S. Greene	B-	3.00	
Legal Writing/ Research	Ellen L. Frye	In Progress (2 semesters)	2.00	
Property 9	Sonia Katyal	B	5.00	
Torts 9 & 10	Benjamin C. Zipursky	B-	5.00	

Spring 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure 9 & 10	Martin S. Flaherty	B+	5.00	
Clinical Externship: Stein Scholars	Andrew Chapin	A-	1.00	
Contracts	Adjunct Professor	B+	5.00	
Legal Writing & Research	Ellen L. Frye	B	3.00	
Legislation & Regulation	James J. Brudney	B	3.00	

Fall 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law	Tracy Higgins	B	4.00	
International Law	Martin S. Flaherty	A-	4.00	
Professional Responsibility: Lawyers and Justice	Russell Pierce	A	3.00	
Refugee Law and Policy	Stephen T. Poellot	A-	2.00	
Terrorism and 21st Century Law	Karen Greenberg	A	2.00	

Spring 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Adv. National Security & Foreign Relations	Andrew Kent	A	2.00	
Clinical Externship: Civil Fieldwork	Bruce Green	Pass	2.00	
Clinical Externship: Civil Seminar	Sherri Levine	A-	1.00	
Corporations	Jeffrey Colon	B	4.00	
Public Interest Lawyer Advanced Seminar	Russell Pierce	A	4.00	
Trial Advocacy Competition Team	James Kainen	Pass	3.00	

Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Conflict of Laws	Marc Arkin	A-	3.00	
Congressional Investigations	Raphael Prober	B	2.00	
Criminal Procedure: Investigative	Ethan Greenberg	B+	3.00	
Federal Courts	Thomas H. Lee	B-	3.00	
Islamic Law and Global Security	Adjunct Professor	A+	2.00	

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Legal Research: NY Laws	Adjunct Professor	B+	1.00	
Evidence	James Kainen	C+	4.00	
Fundamentals of New York Law	Adjunct Professor	B	2.00	
International Financial Crime	Gerald Manweh	A-	2.00	
Law and Economics	John Pfaff	A	3.00	

Grading System Description
Grade Scale for the Juris Doctor (J.D.)

Prior to Fall 2014:
Grade Quality Points
A+ 4.30
A 4.00
A- 3.70
B+ 3.30
B 3.00
B- 2.70
C+ 2.30

Effective Fall 2014
Grade Quality Points
A+ 4.333
A 4.000
A- 3.667
B+ 3.333
B 3.000
B- 2.667
C+ 2.333

Fordham Law School does not calculate class rankings.

Jacqueline Barkett
University of Southern California
Cumulative GPA: 3.3

Fall 2007

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Chinese III		P	4.0	
Communication as a Liberal Art		B+	4.0	
Deepwater Cruising		B	2.0	
Earthquakes		B-	4.0	
Introduction to Mass Communication Theory and Research		B	4.0	

Spring 2008

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Writing		C+	4.0	
Communication and Social Sciences		A-	4.0	
East Asian Societies		B	4.0	
International Relations		C	4.0	

I was out of class quite a bit this semester because my roommate and cousin was diagnosed with ovarian cancer and could not return to school.

Summer 2008

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Comparitive Media In Europe		A-	4.0	
Special Topics (Applied Communication Studies in Global Media)		A-	2.0	

Fall 2008

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Communication and Social Movements		A	4.0	
Media and Society		B+	4.0	
Philosophical Foundations of Modern Western Culture		P	4.0	
Research Practicum		P	2.0	
Sports, Communication and Culture		B+	4.0	

Spring 2009

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS

Argumentation and Advocacy	A-	4.0
Communication and Culture	B	4.0
Directed Research	A	2.0
Gender in Media Industries and Products	B	4.0
Studies in Arts and Letters	A-	4.0

Grading System Description

The following grades are used: A, excellent; B, good; C, fair in undergraduate courses and minimum passing in courses for graduate credit; D, minimum passing in undergraduate courses; and F, failed. Additional grades include CR, credit; NC, no credit; P, pass; and NP, no pass.

The following marks are also used: W, withdrawn; IP, in progress; UW, unofficial withdrawal; MG, missing grade; IN, incomplete; and IX, lapsed incomplete.

GRADE POINT AVERAGE (GPA) CATEGORIES/CLASS LEVEL

A system of grade points is used to determine a student's grade point average. Grade points are assigned to grades as follows for each unit in the credit value of a course: A, 4.0 points; A-. 3.7 points; B+, 3.3 points; B, 3.0 points: B-, 2.7 points; C+, 2.3 points; C, 2.0 points; C-, 1.7 points; D+, 1.3 points; D, 1.0 point; D-, 0.7 points; F, 0 points; UW, 0 points; and IX, 0 points. Marks of CR, NC, P, NP, W, IP, MG and IN do not affect a student's grade point average.

There are four categories of class level and GPA: Undergraduate, Graduate, Law, and Other. UNDERGRADUATE is comprised of freshman (less than 32 units earned), Sophomore (32 to 63.9 units earned). Junior (64 to 95.9 units earned) and Senior (at least 96 units earned). GRADUATE is comprised of any coursework attempted while pursuing a master's and/or doctoral degree. LAW is comprised of any coursework attempted while pursuing a Juris Doctor or Master of Laws degree.

OTHER is comprised of any coursework attempted while not admitted to a degree program or coursework not available for degree credit.

Jacqueline Barkett
University of Southern California
Cumulative GPA: 3.7

Fall 2009

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Conflict and Cooperation		B	4.0	
Global Issues and Public Diplomacy		A	4.0	
Historical and Comparative Approaches to Public Diplomacy		A-	4.0	

Spring 2010

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Cultural Diplomacy		A	4.0	
Hard Power, Soft Power and Smart Power		A-	4.0	
Media and Politics		A-	4.0	

Fall 2010

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Communication for International Development		A	4.0	
Field Study		A	1.0	
News Media and the Foreign Policy Press		B+	4.0	
Theories of Diplomacy		A-	4.0	

Spring 2011

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
International Relations of the Middle East		B	4.0	
Practicum in Public Diplomacy Research		CR	4.0	
Special Topics (Public Diplomacy Evaluation)		A	4.0	

Grading System Description
The following grades are used: A, excellent; B, good; C, fair in undergraduate courses and minimum passing in courses for graduate credit; D, minimum passing in undergraduate courses; and F, failed.

Additional grades include CR, credit; NC, no credit; P, pass; and NP, no pass.

The following marks are also used: W, withdrawn; IP, in progress; UW, unofficial withdrawal; MG, missing grade; IN, incomplete; and IX, lapsed incomplete.

GRADE POINT AVERAGE (GPA) CATEGORIES/CLASS LEVEL

A system of grade points is used to determine a student's grade point average. Grade points are assigned to grades as follows for each unit in the credit value of a course: A, 4.0 points; A-. 3.7 points; B+, 3.3 points; B, 3.0 points: B-, 2.7 points; C+, 2.3 points; C, 2.0 points; C-, 1.7 points; D+, 1.3 points; D, 1.0 point; D-, 0.7 points; F, 0 points; UW, 0 points; and IX, 0 points. Marks of CR, NC, P, NP, W, IP, MG and IN do not affect a student's grade point average.

There are four categories of class level and GPA: Undergraduate, Graduate, Law, and Other. UNDERGRADUATE is comprised of freshman (less than 32 units
earned), Sophomore (32 to 63.9 units earned). Junior (64 to 95.9 units earned) and Senior (at least 96 units earned).

GRADUATE is comprised of any coursework
attempted while pursuing a master's and/or doctoral degree. LAW is comprised of any coursework attempted while pursuing a Juris Doctor or Master of Laws degree.
OTHER is comprised of any coursework attempted while not admitted to a degree program or coursework not available for degree credit.

Fordham University School of Law
150 West 62nd Street
New York, NY 10023

March 18, 2022

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

I am writing to highly recommend Jacqueline Barkett for a clerkship. Jacqueline was my student at Fordham Law during which time she also served as my research assistant. As Jacqueline went on to work as a lawyer in the Honors Program at DoJ and then in the National Security Division at DoJ, she has stayed in touch. She is currently a Fellow at the Center on National Security, which I direct, and oversees our Law and Policy Books Program, a series of public events that focus on newly published books by former officials and policy makers in the area of law and security.

Jacqueline is a star. She has a genuine passion for the law, an acute intellect, a breadth of knowledge, and a talent for both writing and speaking. Her work has been consistently excellent. Jacqueline tackles questions with an intellectual energy that enables her to focus completely on the questions in front of her with a relentless and thoughtful dedication. At times, as at some moot arguments, I have seen her bring to bear aspects of the law that elude others, providing helpful, sometimes groundbreaking avenues for thought and argument.

Jacqueline's research and writing abilities are top-notch. I relied consistently over the years on the quality of her legal research for my own publications. She takes the initiative to research with a diligence that attends to breadth as well as depth, never losing sight of the question in front of her. She writes exceptionally well; her style is clear, intelligent and well-reasoned. Moreover, she is always thoughtful, be it in her writing, her speaking, or her reflections on the work or thought of others.

Since she graduated from Fordham Law, Jacqueline has worked in several capacities in Main Justice and the National Security Division. They have learned to rely on her for a strong commitment to the work at hand, and an exceptional eye for the most productive avenues of research.

Jacqueline is accomplished in many ways. She interned in Beirut, Rome and the White House. She is proficient in Arabic, and acquainted with Mandarin. She has spent time traveling and volunteering in Africa.

In addition to her demonstrated commitment to her work, Jacqueline keeps steadily abreast of contemporary writing and analysis. She is engaged with the larger intellectual trends of the day in a way that infuses the depth and clarity of her research and writing.

This letter of recommendation would not be complete without mention of Jacqueline's demeanor. She is an absolute pleasure to work with. She is sophisticated and mature, adept at complex issues, open to guidance, and works well with her peers.

In my estimation, Jacqueline has a distinguished career ahead of her. She has my highest recommendation without reservation.

Sincerely,

Karen J. Greenberg, Ph.D.
Director
Center on National Security
Fordham Law School

Karen Greenberg - greenbergkarenj@gmail.com - 6462933929

U.S. Department of Justice

United States Attorney
Eastern District of New York

271 Cadman Plaza East
Brooklyn, New York 11201

March 18, 2022

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

I write to recommend Jacqueline Barkett for a clerkship position in your chambers. I'm confident that Jackie's passion for the law and her desire to grow and learn as a young attorney will make her a valuable asset to you.

By way of background, I am Chief of the National Security & Cybercrime Section at the U.S. Attorney's Office in the Eastern District of New York ("EDNY"). I have been an Assistant United States Attorney since 2009. Prior to that, I was an associate attorney at Cravath, Swaine & Moore LLP and a law clerk for the Honorable Naomi Reice Buchwald in the Southern District of New York.

As I am sure you are aware, Jackie joined the Department of Justice as an attorney in 2015 through the Attorney General's Honors Program and has worked in the National Security Division since that time. Jackie has been detailed to EDNY for the past two years, serving both as a trial attorney in the Counterterrorism Section and as a Special Assistant United States Attorney supporting EDNY's national security practice. In that capacity, I've had the opportunity to oversee Jackie's work on several matters, and she has impressed me with both her poise and her ability to navigate the complicated and often challenging bureaucracy of the Department of Justice.

Jackie's most distinctive characteristics are her enthusiasm and positive attitude. She routinely volunteers to take on additional work, and she's been extremely valuable supporting EDNY AUSAs on a variety of our most important counterterrorism matters – all while continuing to manage a full Counterterrorism Section caseload. She has sought out opportunities to expand her skills, whether by tenaciously cultivating nascent investigations or by seeking formal and informal training from myself and other experienced prosecutors in our section. She is entrepreneurial, but at the same time has demonstrated sound judgment in knowing when she needs help and supervisory guidance.

Jackie has an easy-going personality and gets along well with others. She is extremely well liked at EDNY, and has made many friends in the Section. She also works well with our partners in the FBI and the Intelligence Community, deftly navigating what can periodically be prickly relationships. Agents like working with her, and she has been helpful at defusing problems on several occasions.

While we have come to value her as a crucial liaison to the National Security Division, I believe that Jackie would benefit enormously from the learning opportunities that a clerkship would afford. I hope you will seriously consider her. And if you would like to discuss her further, please do not hesitate to contact me.

Sincerely,

Richard M. Tucker
Assistant United States Attorney

Richard M. Tucker - RTucker@usa.doj.gov - (718) 254-6204

U.S. Department of Justice

Criminal Division

Joseph Palazzo

1400 New York Avenue N.W.
Trial Attorney Washington, DC 20530

Money Laundering and Asset Recovery Section

(202)445-7910 Cell
(703)488-2358 Desk

March 18, 2022

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

I am writing to recommend Jacqueline L. Barkett for a clerkship in your chambers. Ms. Barkett has been a colleague for nearly four years at the Department of Justice and is my co-counsel in United States v. Kassim Tajideen and Imad Hassoun, 1:17-CR-46-RBW, a complex criminal matter we are prosecuting in the U.S. District Court in the District of Columbia. We also serve together on the Hizballah Narcoterrorism Finance Team chaired by Criminal Division Principal Assistant Attorney General John P. Cronan.

Ms. Barkett stands out as a skilled attorney who writes exceptionally well and displays sound legal judgment. We began working together while she was on detail to the National Security Section of the U.S. Attorney's Office for the District of Columbia. After being assigned during the investigative stage of a case moving rapidly toward the charging of foreign actors with multiple conspiracies for money laundering and IEEPA violations, Ms. Barkett immediately established herself as a reliable writer and researcher eager to tackle important legal questions under harsh time pressures. Our investigation involved a sophisticated fraud and sanctions violation scheme, complete with a web of nearly one hundred front companies, a myriad of complex financial transactions, and evidence from over fifty different sources of information in multiple languages. Ms. Barkett absorbed these challenges and met them with intellect, creativity, and old-fashioned hard work. Most helpful to me beyond her ability to think and act quickly, has been her aptitude for anticipating legal problems before they arise. She has constructively confronted me, as well as other senior members of the team, on important legal and practical issues that she was first to see. More than just an issue spotter, Ms. Barkett has constantly displayed a willingness to solve problems and keep our team moving toward a successful prosecution. In particular, she proved to be absolutely invaluable during a compressed period after the arrest of our lead defendant, when she played an integral role drafting and reviewing a foreign extradition document package, four internal legal memoranda, two agent affidavits, and the government's response to eleven motions or filings by the defendant, seven of which were dispositive. If it wasn't for her youthful appearance, Ms. Barkett would be mistaken for a multi-decade veteran.

Beyond her writing ability and legal acumen, Ms. Barkett also receives my highest endorsement for her character and personality. She is pleasant and easy to work with despite being in a persistently high-pressure environment full of egos and long hours. Whether facing a seemingly impossible court filing deadline, meeting with a particularly nasty defense attorney, or dealing with a micromanaging supervisor, Ms. Barkett has been unflappable for the past four years. She is a favorite of agents, fellow prosecutors, and interagency colleagues alike. I can only conclude that this is due to her sincere respect for others, as well as a genuine, good-natured disposition. In part, I am saddened to be writing this letter, as it means I am sure to lose my finest partner here at the Justice Department. But I am also confident that Jacqueline L. Barkett will honorably serve in your chambers and prove to be an invaluable clerk. Thank you for considering her application.

If you would like to discuss her candidacy further, please do not hesitate to reach out to me directly.

Sincerely,
.
Joseph Palazzo

JACQUELINE L. BARKETT
(858) 349-4315 | jbarkett22@gmail.com

This writing sample is a draft memo analyzing whether 18 U.S.C. § 112(a) or (b) qualifies as a 'crime of violence.' This memo was written before the Supreme Court's recent decision in Sessions v. Dimaya, 138 S. Ct. 1204 (2018). This a second draft that was only slightly edited.

***United States v. S.M.A.*, No. 16-476**
Research Re: Transfer to Adult Status

You have asked me to research two questions relating to the transfer of a juvenile to adult status: (1) Does a charge pursuant to 18 U.S.C. § 922(x)(2) qualify a juvenile for a discretionary transfer to adult status? (2) Does a charge pursuant to 18 U.S.C. § 112(a) or (b) qualify as a "crime of violence" to justify discretionary transfer to adult status? The first issue appears to be an open question, though it seems unlikely that a court would transfer a juvenile to adult status on the basis of a § 922(x) charge alone under an "interests of justice" standard. As to the second question, there is a strong argument that the § 112(a) charge against S.M.A. qualifies as a crime of violence. A violation of § 112(b) would not support a transfer because it is a misdemeanor offense, and the transfer statute requires a charge which "if committed by an adult would be a felony that is a crime of violence." 18 U.S.C. § 5032.

[The answer to the first part of this questions has been edited out for the part that I did not write]

Transfer on the Basis of a "Crime of Violence"

The discretionary transfer provision in § 5032 applies to a juvenile who commits an act that "if committed by an adult would be a felony that is a crime of violence." S.M.A. has been charged with violations of 18 U.S.C. § 112(a) and (b). Section 112(a) provides for imprisonment of up to three years for anyone who "assaults, strikes, wounds, imprisons, or offers violence to a foreign official . . . or makes any other violent attack upon the person or liberty of such person, or, if likely to endanger his person or liberty, makes a violent attack upon his official premises, . . . or attempts to commit any of the foregoing." The statute imposes a maximum ten-year penalty if the offender "uses a deadly or dangerous weapon, or inflicts bodily injury" in the commission of the offense. § 112(a). Section § 112(b) is a misdemeanor offense, subject to up to six months' imprisonment, that prohibits willfully intimidating, coercing, threatening, or harassing a foreign official, obstructing foreign officials in the performance of their duties, and attempting to do the same.

Because § 112(b) is a misdemeanor offense, it would not qualify under § 5032 as an offense justifying transfer to adult status, regardless of whether it is a crime of violence. Section 112(a) is a felony offense that can be committed by an adult, so it would qualify so long as it is a crime of violence.

While § 5032 does not define crime of violence, it adopts the definition set forth in 18 U.S.C. § 16. *See United States v. Juvenile Female*, 566 F.3d 943, 947 (9th Cir. 2009) (adopting this approach); S. Rep. No. 225, 98th Cong., 2d Sess. 389 & n.7, reprinted in 1984 U.S.C.C.A.N. 3182, 3529 & n.7. Under § 16, the term "crime of violence" means:[1]

[1] The Supreme Court has granted certiorari with respect to the question whether 18 U.S.C. § 16(b), as incorporated into the Immigration and Nationality Act's provisions governing removal, is unconstitutionally vague. *See Sessions v. Dimaya*, No. 15-1498. However, *Dimaya* is on review from the Ninth Circuit, which held § 16(b) to be unconstitutionally vague. *See Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015). That holding remains binding in this case. Because the Supreme Court is highly unlikely

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

In construing § 16, "we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.' The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person . . . suggests a category of violent, active crimes." *Juvenile Female*, 56 F.3d at 947 (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004)).

"When exercising jurisdiction over a juvenile," the Ninth Circuit follows the "'categorical approach' to determine whether an offense is a crime of violence." *Id.* at 946. "Under the categorical approach, the generic, rather than the particular, nature of the predicate offense is determinative in defining a crime of violence." *Id.* (internal quotation marks omitted). "A crime 'qualifies as a crime of violence . . . if and only if the full range of conduct covered by it falls within the meaning of that term.'" *Id.* (quoting *Valencia v. Gonzales*, 439 F.3d 1046, 1049 (9th Cir. 2006)). However, "[t]he categorical approach does not focus on a criminal statute in its entirety, but on the offense or crime." *Id.* at 947.

United States v. Juvenile Female provides particularly strong support for the position that the § 112(a) charge against S.M.A. qualifies as a crime of violence. In *Juvenile Female*, the juvenile was charged with delinquency in violation of 18 U.S.C. § 111(a) and (b) (assaulting a federal officer with a deadly or dangerous weapon) after she had attempted to resist apprehension by a Border Patrol agent and stabbed the agent with a knife.[2] 566 F.3d at 944–45. The juvenile challenged the district court's jurisdiction over the delinquency proceeding, arguing that § 111 is not categorically a crime of violence. *Id.* at 945.

---

to decide this issue prior to the government's transfer motion in this case, this memo analyzes § 112(a) only with respect to § 16(a)'s elements-based definition.

[2] 18 U.S.C. § 111 provides:

(a) In general.—Whoever—

(1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties; or

(2) forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 on account of the performance of official duties during such person's term of service,

shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both.

(b) Enhanced penalty.—Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

The Ninth Circuit began its analysis by noting that § 111(b) states a separate offense from § 111(a)—"assault involving a deadly or dangerous weapon or resulting in bodily injury"—and rejected the juvenile's contention that this offense "subsumes five other non-assaultive offenses, because it also lists those who resist, oppose, impede, intimidate, or interfere with designated officers." *Id.* at 946–47. The court held that "an 'assault involving a deadly or dangerous weapon or resulting in bodily injury,' under 18 U.S.C. § 111, is, categorically, a crime of violence." *Id.* at 947. Dividing the offense into two variants—"(1) assault involving a deadly or dangerous weapon, and (2) assault resulting in bodily injury"—the Ninth Circuit looked to its prior case law interpreting the law of assault and explained:

> A defendant charged with the first variant, assault with a deadly or a dangerous weapon, must have always "threatened [the] use of physical force," 18 U.S.C. § 16(a), because he or she will have either made a "wilful attempt to inflict injury" or a "threat to inflict injury," [*United States v. Chapman,* 528 F.3d 1215, 1219–20 (9th Cir. 2008)] (internal quotation omitted), with an object that "may endanger the life of or inflict great bodily harm on a person," [*United States v. Sanchez,* 914 F.2d 1355, 1358 (9th Cir. 1990)]. Similarly, a defendant charged under the second variant, assault resulting in bodily injury, necessarily must have committed an act of force in causing the injury. Thus, both variants are "crimes of violence" pursuant to 18 U.S.C. § 16(a).

Juvenile Female, 566 F.3d at 947–48.[3]

This logic appears to apply fairly well to § 112(a). Section 112(a) states at least two offenses: the baseline offense, punishable by three years' imprisonment, and the enhanced penalty offense for using a deadly or dangerous weapon or inflicting bodily injury, punishable by up to ten years' imprisonment. Even though these offenses are not divided into separate subsections as in § 111, the facts that they carry different penalties and that the enhanced penalty provision has an added element are sufficient to make them separate offenses. *See Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016) ("If statutory alternatives carry different punishments, then . . . they must be elements."). Thus, like § 111(b), § 112(a) states an offense of assault involving a deadly or dangerous weapon or resulting in bodily injury. And here, S.M.A. was charged with this enhanced penalty offense. *See* Information, Count One (charging the use of a deadly or dangerous weapon).

S.M.A. may argue that, unlike § 111, the various means of committing § 112(a) have not been read to also require an underlying assault. *See Chapman*, 528 F.3d at 1219 ("[W]hile a

[3] The panel also concluded that assault involving a deadly or dangerous weapon or resulting in bodily injury states a crime of violence pursuant to § 16(b). *Juvenile Female*, 566 F.3d at 948 ("[B]ecause the offense is a felony, section 16(b) also applies. Section 16(b) sweeps more broadly than section 16(a) because it encompasses offenses where a person merely disregards a *risk* that physical force will be used in commission of the offense. For the same reasons described above, the two variants on this crime will always involve a substantial risk that physical force against the person may be used, even if physical force is not an element of the offense. (citations omitted)).

defendant could be charged with resisting, opposing, impeding, intimidating, or interfering, he could not be convicted unless his conduct *also* amounted to an assault."); *United States v. Dupree*, 544 F.2d 1050, 1051 (9th Cir. 1976) (defining assault as "either a willful attempt to inflict injury upon the person of another, or . . . a threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm"). According to this argument, *Juvenile Female* would be inapposite because its logic assumes assaultive conduct for any form of the offense. And, the argument would go, some of the alternative forms of conduct in § 112(a) are non-assaultive and therefore non-violent. Most notably, imprisoning someone, at least in some circumstances, may not qualify as a crime of violence. *Cf. United States v. Hernandez-Hernandez*, 431 F.3d 1212, 1217 (9th Cir. 2005) (applying the modified categorical approach to California's false imprisonment statute to distinguish between false imprisonment through the use of violence, which constitutes a crime of violence, and false imprisonment by deceit or fraud, which does not).

This is not a strong argument on the face of § 112(a). The range of conduct prohibited by § 112(a) is not as broad as that listed in § 111, so the relationship to traditional assault is much clearer even absent the Ninth Circuit's gloss on § 111. The vast majority of the prohibited conduct—assaults, strikes, wounds, or offers violence to; "makes any other violent attack upon the person or liberty of such person"; and "makes a violent attack upon his official premises . . . if likely to endanger is person or liberty"—fit within the definition of assault. While "imprisons" arguably might not meet the definition of assault in some circumstances, this concern is significantly diminished in the context of the enhanced penalty offense: to the extent a defendant were to imprison someone using "a deadly or dangerous weapon" or while inflicting bodily injury, this form of imprisonment seems to fall more squarely within the definition of assault. Thus, with respect to the enhanced penalty offense—with which S.M.A is charge—*Juvenile Female* is squarely on point.

Finally, courts have acknowledged that § 112(a) focuses on violent conduct, which may aid the government's argument that the included offenses are crimes of violence. *See United States v. Gan*, 636 F.2d 28, 30 (2d Cir. 1980) ("The distinction between s 112(a) and s 112(b) lies in whether the act was violent . . . . Section 112(a) punishes violent conduct only.") Moreover, courts have explained that § 112 was enacted to conform U.S. laws to international conventions "intended to protect foreign officials and diplomats from various terroristic acts, including murder, kidnapping and assault, and threats or attempts to commit such acts." *CISPES (Comm. in Solidarity with People of El Salvador) v. FBI*, 770 F.2d 468, 472 (5th Cir. 1985) (citing 1976 U.S.C.C.A.N. 4480, 4482). Thus, there is a strong argument that hypothetical non-violent ways of committing a violation of § 112(a) (*e.g.*, imprisonment by deceit) are not within the scope of the statute.

* * *

In sum, § 112(a) appears to be the government's strongest charge for obtaining a transfer to adult status. The government should not rely solely on the § 922(x) argument, but it could make both the § 112(a) and § 922(x) arguments. Depending on strategic considerations, the government also could pursue the possibility of filing a Superseding Information adding other offenses enumerated in § 5032.

Applicant Details

First Name	**Miriam**
Middle Initial	**B.**
Last Name	**Bial**
Citizenship Status	**U. S. Citizen**
Email Address	**mb7843@nyu.edu**
Address	**Address** Street **400 West 25th Street, Apt 1E** City **New York** State/Territory **New York** Zip **10001** Country **United States**
Contact Phone Number	**6465257356**

Applicant Education

BA/BS From	**University of Chicago**
Date of BA/BS	**June 2017**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 20, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Moot Court Board, Managing Editor**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Prince Evidence Competition** **Immigration Law Competition Problem Writer**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Issacharoff, Samuel
samuel.issacharoff@nyu.edu
212.998.6580
Rothschild, Zalman
zalman.rothschild@gmail.com
(718) 696-8577
Kennedy, David
David.Kennedy2@usdoj.gov
212-637-2733

This applicant has certified that all data entered in this profile and any application documents are true and correct.

The Honorable Eric N. Vitaliano
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Dear Judge Vitaliano,

My name is Miriam Bial and I am a third-year student at New York University School of Law. I will start work as an Associate at Quinn Emanuel Urquhart & Sullivan, LLP beginning in 2022. I am writing to apply for a clerkship beginning in 2023 or any subsequent term.

This application packet contains my résumé, my law school transcript, my undergraduate transcript from the University of Chicago, and a writing sample.

My first letter of recommendation was written by Professor Samuel Issacharoff (Bonnie and Richard Reiss Professor of Constitutional Law at NYU Law). I am currently working as a litigation assistant for Professor Issacharoff. I have also served as a teaching assistant for Professor Issacharoff's civil procedure class and he has seen my work as a student in that class as well as in his course on complex litigation. Professor Issacharoff may be reached at samuel.issacharoff@nyu.edu or (917) 592-5628.

My second letter of recommendation was written by AUSA David Kennedy (Co-Chief of the Civil Rights Unit for the U.S. Attorney's Office for the Southern District of New York). AUSA Kennedy oversaw my externship in the civil division of the U.S. Attorney's Office for the Southern District of New York, where he reviewed my writing, discovery, and oral advocacy skills. AUSA Kennedy may be reached at david.kennedy2@usdoj.gov or (917) 796-0364.

My third letter of recommendation was written by Professor Zalman Rothschild (Adjunct Professor of Law at NYU Law). I worked as a research assistant for Professor Rothschild and conducted legal research and drafted and edited language for articles he published in law review journals. He has seen my work in that capacity as well as in a seminar on the First Amendment's religion clauses. Professor Rothschild may be reached at zalman.rothschild@gmail.com or (718) 696-8577.

Christopher Kercher (Partner at Quinn Emanuel Urquhart & Sullivan, LLP) and AUSA Stephen Cha-Kim have agreed to serve as additional references. Christopher Kercher may be reached at christopherkercher@quinnemanuel.com or (212) 849-7263. AUSA Cha-Kim may be reached at stephen.cha-kim@usdoj.gov or (347) 380-0284.

I can be contacted by email at mb7843@nyu.edu or by telephone at (646) 525-7356. Thank you for your consideration.

Respectfully,
Miriam Bial

MIRIAM BIAL

400 West 25th Street, Apartment 1E, New York, NY 10001 • (646) 525-7356 • mb7843@nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Candidate for J.D., May 2022
GPA (unofficial): 3.83
Honors: Florence Allen Scholar (Top 10% of class after four semesters)
Moot Court Board: Managing Editor, Competitor, and Immigration Law Problem Writer
Note: *Settling for Honor: How Civil Settlements Present a Unique Path to Redress for Honor Disputes*
Activities: Teaching Assistant for Professor Samuel Issacharoff (Civil Procedure)
Research Assistant for Professor Zalman Rothschild (First Amendment Free Exercise Clause)
Affinity Groups: OUTLaw, Law Women, and Jewish Law Students Association

UNIVERSITY OF CHICAGO, Chicago, IL
B.A. in Public Policy with Honors, Specialization in Urban Policy, Minor in Human Rights, June 2017
Honors: Dean's List 2014 – 2017, Graduated with Honors
Senior Thesis: *Sex, Money, and Politics: The Role of Gender in Senatorial Fundraising Habits*

EXPERIENCE

QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, NY
Associate, Fall 2022; ***Summer Associate***, Summer 2021
Researched and wrote memoranda on market manipulation, Communications Decency Act § 230 immunity, and personal jurisdiction for internet torts for use in briefs, complaints, and client pitches. Wrote section of motion to dismiss brief for an antitrust suit and client memoranda on best practices for preserving electronic data.

PROFESSOR SAMUEL ISSACHAROFF, New York, NY
Litigation and Research Assistant, September 2021 – Present
Drafted report evaluating plebiscite options for Puerto Rican governance. Analyzed constitutionality and feasibility of mutual consent provisions, American citizenship, federal representation, and legislative veto. Aided class certification efforts for an antitrust case. Wrote memoranda seeking to amend the schedule to permit expert discovery and greater briefing. Drafted renewed memoranda in support of class certification.

NEW YORK STATE ATTORNEY GENERAL'S OFFICE, LABOR BUREAU, New York, NY
Extern, September 2021 – Present
Write appellate briefs supporting Unemployment Insurance Board determinations. Conduct client intakes via phone and assist bureau investigations by reviewing contracts, conducting legal research, and drafting subpoenas.

U.S. ATTORNEY'S OFFICE FOR THE SOUTHERN DISTRICT OF NEW YORK, CIVIL DIVISION, New York, NY
Extern, Fall 2020
Wrote semiweekly internal memoranda on settlement ranges for environmental suits, the evidence ramifications of an overbroad police search, and how certain government housing and transportation grants could give rise to affirmative litigation. Mooted AUSAs preparing for upcoming oral arguments.

THE HON. CAROL BAGLEY AMON, U.S. DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, Brooklyn, NY
Judicial Intern, Summer 2020
Drafted opinions for substantive motions including summary judgment in employment discrimination suit and motion to dismiss civil suit involving international terrorism. Wrote bench memoranda in criminal narcotics case as well as civil suit concerning online ADA compliance.

NATIONAL ABORTION FEDERATION, Washington, DC
Policy Coordinator, July 2018 – June 2019
Created regulatory comments, talking points, Op-Eds, and hearing testimony for use by abortion providers, advocates, and legislators. Advised providers regarding the impact of federal and state litigation, legislation, and regulation.

KIRBY MCINERNEY LLP, New York, NY
Litigation Paralegal, June 2017 – July 2018
Drafted, edited, cite-checked, and filed court documents for all aspects of whistleblower and class action securities litigation. Conducted legal research and investigative financial research into companies' stock market activity.

Name: **Miriam Bial**
Print Date: **02/01/2022**
Student ID: **N14909413**
Institution ID: **002785**
Page: **1 of 2**

New York University
Beginning of School of Law Record

Fall 2019

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Jonathan F Harris			
Torts	LAW-LW 11275	4.0	A-
Instructor: Mark A Geistfeld			
Procedure	LAW-LW 11650	5.0	A-
Instructor: Samuel Issacharoff			
Contracts	LAW-LW 11672	4.0	A
Instructor: Richard Rexford Wayne Brooks			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: When Law Fails			
Instructor: Moshe Halbertal			
Mattias Kumm			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2020

School of Law
Juris Doctor
Major: Law

--
Due to the COVID-19 pandemic, all spring 2020 NYU School of Law (LAW-LW.) courses were graded on a mandatory CREDIT/FAIL basis.
--

Property	LAW-LW 10427	4.0	CR
Instructor: Katrina M Wyman			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Jonathan F Harris			
Legislation and the Regulatory State	LAW-LW 10925	4.0	CR
Instructor: Adam M Samaha			
Criminal Law	LAW-LW 11147	4.0	CR
Instructor: Erin Murphy			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2020

School of Law
Juris Doctor
Major: Law

Marden Competition	LAW-LW 11554	1.0	CR
Evidence	LAW-LW 11607	4.0	A-
Instructor: Daniel J Capra			
Government Civil Litigation Externship-Southern District	LAW-LW 11701	3.0	A
Instructor: David Joseph Kennedy			
Seungkun Kim			
Government Civil Litigation Externship - Southern District Seminar	LAW-LW 11895	2.0	A
Instructor: David Joseph Kennedy			
Seungkun Kim			
Religion and the First Amendment	LAW-LW 12135	2.0	A+
Instructor: Schneur Z Rothschild			
John Sexton			
Life of Honor Seminar	LAW-LW 12372	2.0	A
Instructor: Kwame Anthony Appiah			
Life of Honor Seminar: Writing Credit	LAW-LW 12406	1.0	A
Instructor: Kwame Anthony Appiah			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	45.0	45.0

Spring 2021

School of Law
Juris Doctor
Major: Law

Complex Litigation	LAW-LW 10058	4.0	A-
Instructor: Samuel Issacharoff			
Arthur R Miller			
Corporations	LAW-LW 10644	4.0	A
Instructor: Ryan J Bubb			
Constitutional Law	LAW-LW 11702	4.0	A-
Instructor: Melissa E Murray			
Research Assistant	LAW-LW 12589	1.0	CR
Instructor: John Sexton			
Cities Seminar	LAW-LW 12771	2.0	A
Instructor: Clayton P Gillette			
Paul M Romer			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	60.0	60.0

Allen Scholar-top 10% of students in the class after four semesters

Fall 2021

School of Law
Juris Doctor
Major: Law

Child Parent and State	LAW-LW 11323	2.0	A-
Instructor: Martin Guggenheim			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	A
Instructor: Geoffrey P Miller			
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Samuel Issacharoff			
Federal Courts and the Federal System	LAW-LW 11722	4.0	A-
Instructor: Trevor W Morrison			
NYS OAG Social Justice Externship	LAW-LW 12601	3.0	CR
Instructor: Sandra Elizabeth Pullman			
NYS OAG Social Justice Externship Seminar	LAW-LW 12602	2.0	A
Instructor: Sandra Elizabeth Pullman			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	75.0	75.0

Spring 2022

School of Law
Juris Doctor
Major: Law

Moot Court Board	LAW-LW 11553	2.0	***
Criminal Litigation	LAW-LW 11887	4.0	***
Instructor: Randy Hertz			
Labor Law	LAW-LW 11933	4.0	***
Instructor: Cynthia L Estlund			
NYS OAG Social Justice Externship	LAW-LW 12601	3.0	***
Instructor: Sandra Elizabeth Pullman			
NYS OAG Social Justice Externship Seminar	LAW-LW 12602	2.0	***
Instructor: Sandra Elizabeth Pullman			

	AHRS	EHRS
Current	15.0	0.0
Cumulative	90.0	75.0

Staff Editor - Moot Court 2020-2021

Name:	**Miriam Bial**
Print Date:	**02/01/2022**
Student ID:	**N14909413**
Institution ID:	**002785**
Page:	**2 of 2**

Managing Editor - Moot Court 2021-2022

End of School of Law Record

ATTACHMENT THREE: Transcript Addendum and Previous Grading Guidelines

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

The following guidelines, adopted in Fall 2008, represent NYU School of Law's current guidelines for the distribution of grades in a single course. Note that JD and LLM students take classes together and the entire class is graded on the same scale.

A+ = 0-2%	**A** = 7-13%	**A-** = 16-24%
B+ = 22-30%	**B** = Remainder	**B-** = 0-8% for 1L JD students; 4-11% for all other students
C/D/F = 0-5%	**CR** = Credit	**IP** = In Progress
EXC = Excused	**FAB** = Fail/Absence	**FX** = Failure for cheating
*** = Grade not yet submitted by faculty member		
Maximum for A tier = 31%; Maximum grades above B = 57%		

The guidelines for first-year JD courses are mandatory and binding on faculty members. In all other cases, they are advisory but strongly encouraged. These guidelines do not apply to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students taking the course for a letter grade.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, or to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process for all NYU School of Law students is highly selective and seeks to enroll individuals of exceptional ability. The Committee on Admissions selects those candidates it considers to have the very strongest combination of qualifications and the very greatest potential to contribute to the NYU School of Law community and the legal profession. The Committee bases its decisions on intellectual potential, academic achievement, character, community involvement, and work experience. For the Class entering in Fall 2020 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 172/167 and 3.9/3.7. Because of the breadth of the backgrounds of LLM students and the fact that foreign-trained LLM students do not take the LSAT, their admission is based on their prior legal academic performance together with the other criteria described above.

Updated: 09/14/2020

REJECT DOCUMENT IF SIGNATURE BELOW IS DISTORTED

THE UNIVERSITY OF CHICAGO
Office of the University Registrar
Chicago, Illinois 60637

Name: Miriam Bess Bial
Student ID: 10436584

Scott C. Campbell, University Registrar

Undergraduate

Degrees Awarded

Degree: Bachelor of Arts
Confer Date: 06/10/2017
Degree Honors: With General Honors
Public Policy Studies (B.A.)

Academic Program History

Program: The College
Start Quarter: Autumn 2013
Current Status: Completed Program
Public Policy Studies (B.A.)
Human Rights (Minor)

External Education

Stuyvesant High School
New York, New York
Diploma 2013

Test Credits

Test Credits Applied Toward Bachelor's Degree

	Earned
Totals:	500

Beginning of Undergraduate Record

Autumn 2013

Course		Description	Attempted	Earned	Grade
HUMA	12300	Human Being And Citizen-1	100	100	A
HUMA	19100	Humanities Writing Seminars	0	0	P
ITAL	20100	Language History Culture-1	100	100	A-
PHSC	11400	Life in the Universe 1: Development of Life on Earth	100	100	B
SOSC	11100	Power, Identity, Resistance-1	100	100	B

Winter 2014

Course		Description	Attempted	Earned	Grade
HUMA	12400	Human Being And Citizen-2	100	100	A-
HUMA	19100	Humanities Writing Seminars	0	0	P
MATH	13100	Elem Functions And Calculus-1	100	100	A-
PHSC	11500	Life in the Universe 2: Extraterrestrial Life	100	100	B
SOSC	11200	Power, Identity, Resistance-2	100	100	B+

Spring 2014

Course		Description	Attempted	Earned	Grade
HUMA	12500	Human Being And Citizen-3	100	100	A
HUMA	19100	Humanities Writing Seminars	0	0	P
MATH	13200	Elem Functions And Calculus-2	100	100	A
PBPL	25880	Poverty, Race, and the Politics of Reproduction	100	100	A
SOSC	11300	Power, Identity, Resistance-3	100	100	B+

Honors/Awards
DEAN'S LIST 2013-14

Autumn 2014

Course		Description	Attempted	Earned	Grade
BIOS	10130	Core Biology	100	100	A
GNSE	27607	Gender in Balkans: Wounded Men, Sworn Virgins, Eternal Mothers	100	100	B+
PBPL	20000	Economics for Public Policy	100	100	A
PBPL	23600	Political Sociology	100	100	A-

Winter 2015

Course		Description	Attempted	Earned	Grade
BIOS	13140	The Public and Private Lives of Insects	100	100	B
HMRT	20200	Human Rights-2	100	100	A-
PBPL	22200	Public Policy Analysis	100	100	B
PBPL	29305	Law and Urban Problems	100	100	B

Spring 2015

Course		Description	Attempted	Earned	Grade
PBPL	22300	Problems of Policy Implementation	100	100	B+
PBPL	29120	Poverty Law & Policy Reform	100	100	A-
STAT	23400	Statistical Models/Method-1	100	100	C+
TAPS	10200	Acting Fundamentals	100	100	A

Honors/Awards
DEAN'S LIST 2014-15

Autumn 2015

Course		Description	Attempted	Earned	Grade
HIST	13500	America In World Civilization-1	100	100	B+
HMRT	20300	Human Rights-3	100	100	A
PBPL	22100	Politics And Policy	100	100	A

Winter 2016

Course		Description	Attempted	Earned	Grade
HIST	13600	America In World Civ-2	100	100	A
HMRT	21400	Health and Human Rights	100	100	A-
PBPL	28501	Process & Policy in State & City Govt.	100	100	A
PLSC	27600	War And The Nation State	100	100	B

Spring 2016

Course		Description	Attempted	Earned	Grade
HMRT	25108	Literature and Human Rights	100	100	A-
PBPL	26400	Quantitative Methods in Public Policy	100	100	B
PBPL	26800	Geographical issues in Housing and Community Development	100	100	B+

Date Issued: 02/28/2018

KEY TO TRANSCRIPT ON FINAL PAGE

THE UNIVERSITY OF CHICAGO
Office of the University Registrar
Chicago, Illinois 60637

Name: Miriam Bess Bial
Student ID: 10436584

Scott C. Campbell, University Registrar

Undergraduate

Honors/Awards
DEAN'S LIST 2015-16

Autumn 2016

Course		Description	Attempted	Earned	Grade
PBPL	27821	Urban Schools and Communities	100	100	A
PBPL	29800	Senior Seminar: Public Policy	100	100	A
PLSC	27001	The Problem of World Government	100	100	A
PLSC	28620	The Intelligible Self	100	100	A

Winter 2017

Course		Description	Attempted	Earned	Grade
LLSO	22403	Free Speech and the First Amendment	100	100	A-
LLSO	25215	The American Presidency	100	100	B+
PBPL	27040	Public Finance and Public Policy	100	100	P
PBPL	29050	Youth Law and Policy: Child Welfare and Juv. Just. in the U.S.	100	100	A-

Undergraduate Career Totals
Cumulative GPA: 3.570 Cumulative Totals 4200 4200

End of Undergraduate

Date Issued: 02/28/2018

New York University
A private university in the public service

School of Law

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E-mail: samuel.issacharoff@nyu.edu

Samuel Issacharoff
Reiss Professor of Constitutional Law

June 14, 2021

RE: Miriam Bial, NYU Law '22

Your Honor:

Miriam Bial is simply delightful. Smart, engaging, enthusiastic, just a great student and will be a wonderful law clerk.

In 30 years of teaching, I have come to recognize that a disproportionate number of my very top students were undergraduates at the University of Chicago. They tend to work really hard (the joke about "where fun comes to die" UC does capture something), they are intellectually sophisticated, and they show an analytic depth that well anticipates what they will be required to do in law school. But mostly they have the right attitude toward learning. They are both inquisitive and skeptical, they respect knowledge but reserve the ability to make critical assessments of settled wisdom.

Miriam is all of these Chicago virtues, except for the lack of fun. On that score, the school failed as there is no sullenness to her at all. But there is a sparkling mind, a vivacious prose and love of language, and a sheer joy of engagement with ideas and arguments.

I first encountered Miriam in my first semester civil procedure class. She sat near the front (I assign seats alphabetically) and I could not help notice the love of vintage shirts from obscure record labels or literary magazines, combined with the UC sweatshirts as the weather cooled. She hesitated at first, but then would join the class discussions when other students seemed to falter. Her answers were not only better than those on the table when the discussion stalled, but in turn would raise the bar for everyone else. The hardest thing for first-year students to do is to anticipate that the question before them is not the last one, but the first one. What if the facts change, what if the law is not as anticipated, what if another party presents a variation of one sort or another? Miriam was one of those students whose inclination was to the next question down the line even before coming to law school. Plus, in good Chicago style, she sweated the details – of the case, of the Rule, of the relation between one area of law and another. Just great.

I hired Miriam to work for me as a teaching assistant, a role that got postponed until her third year because of my being on leave and then the disruptions of COVID. I cannot assess her in that role yet, but I can say that every engagement with her, including in my complex litigation

class this past semester, confirms my decision to hire her. My teaching assistants have to run a weekly session with 22 students, have to grade and edit all the written essays from civil procedure, and have to be mentors for very nervous first semester students. Miriam was an easy choice for me.

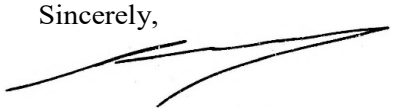
I observed Miriam's writing as a first year, both on her exam and on the written submissions during the year. She has not done subsequent writing under my supervision. But I have read her major paper on the role of honor in the settlement of civil disputes (written for Anthony Appiah's seminar) and her paper of a draft judicial opinion on COVID-restrictions for religious institutions (written for John Sexton's course on religious liberty). Both are elegantly constructed, beautifully written, and just brimming with ideas and insights. She also shows creativity (and wit) in drawing on everything from television to popular songs to illustrate points.

Miriam was in my course on complex litigation this past semester (co-taught with Arthur Miller), and was again a delight. She continues her path of only "A"-level grades in law school, a strong achievement given the strict curve at NYU. She simply stands out in everything she does.

I am certain that Miriam will be a wonderful law clerk.

Please feel free to call if there is any further information I can provide.

Sincerely,



Samuel Issacharoff

NYU | LAW

ZALMAN ROTHSCHILD
Adjunct Professor of Law

NYU School of Law
40 Washington Square South
New York, NY 10012
P: 718 696 8577
zalman.rothschild@nyu.edu

June 14, 2021

RE: Miriam Bial, NYU Law '22

Your Honor:

I write to enthusiastically recommend Miriam Bial as a law clerk in your chambers.

I taught Miriam during the Fall 2020 semester at NYU School of Law. The course was the First Amendment's Religion Clauses, which I co-taught with Professor John Sexton. Miriam was very engaged and early on demonstrated an impressive understanding of the cases and principles we tackled in the course. She was humble, clear-minded and insightful, and she contributed to class discussions significantly.

My respect and admiration for Miriam only increased when I read her exam. The assignment given to the students was to write a Supreme Court opinion "reviewing" a lower federal court decision pertaining to a Covid-19-related free exercise challenge. It became immediately apparent that Miriam understood the issues at play in a profoundly nuanced way. Miriam received the only A+ in the course; awarding her that grade was not a difficult choice.

I was so impressed with Miriam that I recruited her to be my RA. To that end, I entrusted Miriam with editing my draft article and bounced substantive questions off her. Her edits and feedback were incredibly helpful (the article was later accepted by Cornell Law Review), her legal research was excellent, and her writing was refreshingly crisp and clear. Miriam is now helping me at the very early planning stage of a new article on the meaning of "general applicability" in the free speech, free exercise, and equal protections contexts. Her research is always on point and I find it helpful to hear her takes on the cases and the themes that emerge from them. Suffice it so say that I have come to rely on Miriam tremendously. My Cornell Law Review article would not be what it is without her, and I would not be as far along on my next article—nor would I be enjoying the process nearly as much as I am—without her. I have asked Miriam to continue serving as an RA throughout the summer and fall.

Miriam is mature, hardworking, professional, and exceptionally smart. I firmly believe she will be an invaluable asset to any judge who invites her to serve as a law clerk. She truly is a gem of a legal mind, a skilled writer, and overall an exceedingly delightful person. It would be my pleasure to talk with you about Miriam any time. My number is 718-696-8577 and my email address is zalman.rothschild@law.nyu.edu.

Sincerely,

Zalman Rothschild

U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street, 3rd Floor
New York, NY 10007

May 11, 2021

Re: *Recommendation of Miriam Bial*

Dear Judge:

I am writing to strongly recommend Miriam Bial for a clerkship in your Chambers. Miriam interned with Assistant United States Attorneys in our Civil Division during the Fall 2020 semester as part of New York University Law School's Government Civil Litigation Clinic. I co-teach the class, which meets for two hours a week for classroom discussion, and keep apprised of the approximately twelve to fifteen hours of work per week done by the interns with their assigned AUSAs. Prior to becoming an Assistant United States Attorney in 2000, I clerked for the Hon. Kimba M. Wood of the Southern District of New York, and the Hon. Wilfred Feinberg of the U.S. Court of Appeals for the Second Circuit. Based on my own years as a law clerk, my classroom experience with Miriam, and my discussions of her with the AUSAs for whom she worked, I believe that Miriam would be an excellent law clerk.

Miriam was the best student in the class during a very challenging semester. As a result of the pandemic, students were required to do all of their field work and participate in the class, which consists of discussions and simulations as well as the occasional lecture, remotely. Miriam initially comes across as quiet and reserved, but it is not long before it becomes clear that she is conscientious, thoughtful, precise, and good humored. Her oral presentations were polished and measured, and even her weekly email reports were carefully written, during a semester when these reports were even more dashed-off than usual. Not Miriam's. As for her writing abilities, we had the opportunity to review a mock summary judgment reply brief that Miriam wrote. Her brief was, again, the best of the class, well-written and well-argued; Miriam not only identified and engaged with all the key arguments, more importantly, she also demonstrated a skilled litigator's nuanced understanding of how to use the relevant procedural posture and standard of review to more effectively advance her position. After teaching this class for a few semesters, I adopted a numerical grading system that creates a record allowing me to rank students over different classes. Based on this record, Miriam was tied for second out of the 130 students who have taken the class over the past few years.

In addition to the seminar, Miriam was assigned to work with two AUSAs. One aspect of the clinic that challenges law students is that AUSAs are typically working on numerous complex matters simultaneously. To keep on top of the work, an intern must be able to address questions as they arise under very different statutes, under tight deadlines, and keep two different supervisors happy — this was particularly difficult during an all-remote semester. Both AUSAs reported that they were impressed by the quality of Miriam's research, found Miriam smart and quick on the

uptake (even when dealing with highly unusual and complicated facts in a newly emerging field of civil rights law), and that she capably did all of the tasks that litigators need to do: promptly researching pressing legal issues or summarizing evidence, then succinctly and accurately preparing her analysis of the law or the facts. Our collective experiences with Miriam, therefore, suggest that she would be a very capable addition to your Court. And, perhaps just as importantly, given her success on this front in our office, which emphasizes collegiality and collaboration, her diligence and intellectual capacity would be accompanied by a thoughtful and cheerful demeanor that makes her an unfailingly pleasant presence in Chambers.

I recommend Miriam highly as a law clerk. Please do not hesitate to contact me at the number below if you have any further questions.

Sincerely,

\s\ David J. Kennedy
David J. Kennedy
Assistant United States Attorney
Tel. No. (212) 637-2733
Fax No. (212) 637-0033

WRITING SAMPLE FOR MIRIAM BIAL

400 West 25th Street, Apartment 1E, New York, NY 10001
(646) 525-7356 • mb7843@nyu.edu

I prepared the following writing sample as an assignment for the seminar portion of my externship with the civil division of the U.S. Attorney's Office for the Southern District of New York. I was given the prior docket materials for a past case and asked to write a reply memorandum of law opposing summary judgement on behalf of the defendants.

The case concerned an alleged violation of the Americans with Disabilities Act wherein the defendants adopted a policy of refusing to perform cosmetic surgeries on HIV+ patients taking certain antiretroviral medications.

I am the sole author of this piece, though I incorporated feedback given to me by AUSAs David Kennedy and Stephen Cha-Kim. I have kept the piece in the USAO's preferred style.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

MARK MILANO,

Plaintiff-Intervenor,

v.

EMMANUEL O. ASARE, M.D., and SPRINGFIELD MEDICAL AESTHETIC P.C. d/b/a ADVANCED COSMETIC SURGERY OF NEW YORK,

Defendants.

15 Civ. 3556 (AT)

DEFENDANTS' REPLY MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGEMENT

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PRELIMINARY STATEMENT

Defendants Emmanuel O. Asare, M.D. ("Dr. Asare"), and Springfield Medical Aesthetic, P.C., by their attorney, Miriam Bial, submit this reply memorandum of law in opposition to the motion for summary judgment filed by Plaintiff United States of America ("the Government") and Intervening Plaintiff Mark Milano ("Mr. Milano") (collectively "Plaintiffs") regarding HIV+ patients, filed March 30, 2017 (ECF No. 87).

Plaintiffs claim that Defendants violated Title III of the Americans with Disabilities Act ("ADA") when Dr. Asare declined to perform elective cosmetic surgery on HIV+ patients who were receiving antiretroviral medications that he feared would create adverse and dangerous interactions with the multiple drug cocktail used during the procedure. Plaintiffs argue that the ADA overrides the legitimate medical discretion of a physician who believes that the potential risk of adverse drug reaction outweighs the necessity of an elective cosmetic surgery. Yet, Plaintiffs fail to cite supporting ADA case law, mischaracterize the factual record, and engage in a battle of the experts in an attempt to poke holes in Dr. Asare's medical research and practice methodologies.

Summary judgement is inappropriate at this point because Plaintiffs cannot prove a violation of the ADA as a matter of law, but rather rely on disputed facts. As a nonexclusive list, Defendants have identified disputes of material fact relating to (1) Plaintiffs' account of Dr. Asare's interactions with Mr. Milano and other patients presenting as HIV+, (2) the meaning of Dr. Asare's letter to Assistant United States Attorney Arastu Chaudhury ("AUSA Chaudhury"), (3) the legitimate medical basis for Dr. Asare's screening policy, and (4) the presence of any pretext disguising a discriminatory animus against HIV+ individuals.

Defendants are not liable under Title III of the ADA because (1) the screening policy is not improper or discriminatory, (2) the screening policy is legitimately predicated on patient safety

and based on Dr. Asare's reasonable medical decision-making which is owed deference, and (3) all of Plaintiffs' suggested modifications to Defendants' screening policies and medical methodologies fundamentally alter the service and so are not required by the ADA. Because Plaintiffs have failed to establish any of these elements as a matter of law, the Court should deny Plaintiffs' motion for summary judgement.

STANDARD OF REVIEW

"Summary judgment is only warranted upon a showing that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Terry v. Ashcroft, 336 F.3d 128, 137 (2d Cir. 2003) (internal quotation marks omitted); Fed. R. Civ. P. 56(c). "A fact is material if it might affect the outcome of the suit under the governing law." Fincher v. Depository Tr. & Clearing Corp., 604 F.3d 712, 720 (2d Cir. 2010) (internal quotation omitted). To proceed, the moving party bears the burden of proving the absence of any material factual issues. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

In determining whether summary judgement may be granted, "the court must draw all reasonable inferences in favor of the nonmoving party even though contrary inferences might reasonably be drawn." Kaytor v. Elec. Boat Corp., 609 F.3d 537, 545 (2d Cir. 2010) (internal citations and quotation marks omitted). Though a "jury, of course, need not credit the expert's conclusions or the plaintiff's underlying testimony[,] . . . on summary judgment, the District Court must construe the evidence in the light most favorable to the non-moving party, and draw all reasonable inferences in its favor." Bynoe v. Target Corp., 548 F. App'x 709, 711 (2d Cir. 2013) (internal citations omitted).

STATEMENT OF FACTS

The relevant factual allegations are set forth in Plaintiffs' Statement of Undisputed Material Facts Pursuant to Local Civil Rule 56.1 and Defendants' Objections and Responses (ECF No. 88) (cited herein as "Pls. 56.1 ¶ _"). For a full summary of events, Defendants respectfully refer the Court to the Statement of Facts in Defendants' Memorandum of Law in Opposition to Plaintiffs' Motions for Summary Judgment Re Mark Milano and HIV+ Patients, at 6-15 (ECF No. 105).

ARGUMENT

The ADA does not impose a strict liability standard for all denials of service but rather prohibits *discriminatory* denials of services. See 42 U.S.C. § 12182(a). To warrant judgment as a matter of law, the Government must prove its claim that there is no dispute of material fact as to whether Defendants' screening policy violates the ADA because (1) "it uses eligibility criteria that screen out or tend to screen out classes of individuals with disabilities," (2) "the criteria are neither necessary to the provision of [Defendants'] services nor a legitimate safety requirement[,]" and (3) "Defendants failed even to consider reasonable modifications to its policy." The Government's Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, at 13 (ECF No. 92) (cited herein as "Gov. Memo. in Supp."). The Government has failed to make such a showing as to all three prongs.

I. Defendants Do Not Apply Discriminatory Eligibility Criteria.

The Government argues that Defendants' screening policy serves as a complete bar on prospective HIV+ patients. See Gov. Memo. in Supp. at 12. This is the first key factual dispute. Defendants contest the claim that the policy was intended as, or even functioned as, a categorical ban on HIV+ patients. See Pls. 56.1 ¶¶ 18, 19, 34, 35, 41, 43. The Government misconstrues Dr. Asare's letter to AUSA Chaudhury and his interactions with the three patients in question. The

Government's interpretation will certainly be contested at trial but must be rejected at this juncture because "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

First, the Government mischaracterizes Dr. Asare's letter to AUSA Chaudhury. That letter was written without input from any counsel that might have informed Dr. Asare how his words could be taken by lawyers. Pls. 56.1 ¶ 47. It was intended to provide context, not a complete explanation of the screening policy. See Pls. 56.1 ¶ 47. Indeed, the Government's own characterization of Dr. Asare's letter is contradicted by its contents. The Government states that in the letter, "Dr. Asare readily admits that Defendants' Policy is based on his comfort level and does not relate to anything intrinsic to the surgical procedure." Gov. Memo. in Supp. at 16. However, the Government fails to mention that Dr. Asare's letter also states a policy of nondiscrimination and clarifies that in this context, "comfort" relates to the fact that the surgical procedures Dr. Asare performs are elective and cosmetic, and thus heightened levels of risk are unacceptable. See Pls. 56.1 ¶ 47. In that letter, Dr. Asare explained that "[a]ny condition that a patient has that to the best of my knowledge will potentially have any negative effect on the outcome of the surgery or recovery process will disqualify the patient." Pls. 56.1 ¶ 47.

Second, the Government presents an entirely disputed account of Dr. Asare's communications with the three named patients. Dr. Asare denies many of the specific statements that the patients have attributed to him. See Pls. 56.1 ¶¶ 19, 35, 43. Additionally, Defendants dispute Plaintiffs' overall accounts of the three patient interactions. See Pls. 56.1 ¶¶ 14–46. Dr. Asare treated the three Individual Plaintiffs respectfully and did not inform them that he had a policy not to perform surgery on HIV+ individuals or tell them that he could "turn away anybody

I want." See Pls. 56.1 ¶¶ 19, 20, 35, 43. Dr. Asare bears no discriminatory animus towards HIV+ individuals and the disputed factual record reflects that. Indeed, in 2016, Dr. Asare did perform surgery on an HIV+ patient because they were not taking antiretroviral medications. Pls. 56.1 ¶ 18. Dr. Asare also signaled that he would perform surgery on Mr. [redacted] once concerns about his elevated white blood cell count were resolved. See Pls. 56.1 ¶¶ 31, 35. These genuine issues of material fact would be sufficient on their own to preclude summary judgement. See Terry, 336 F.3d at 137.

II. Defendants' Screening Policy Is Legitimately Predicated on Patient Safety.

The ADA provides an exception for "the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability . . . [if] such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered." 42 U.S.C. § 12182(b)(2)(A)(i). While Plaintiffs claim that Dr. Asare's reasoning is "baseless" and lacks "scientific basis," those assertions are disputed both in fact and in case law. See Pls. 56.1 at 17, 24.

First, the parties dispute the factual backing of Dr. Asare's determination not to treat patients receiving antiretrovirals because of potential negative interactions with the multiple drug cocktail he uses for sedation and anesthesia. See Pls. 56.1 ¶ 48. Though the Government states that "Defendants have not identified a single clinical study or trial that shows that the drugs used in Dr. Asare's procedures have a risk of significant adverse interaction with antiretroviral medications[,]" the Government has similarly failed to identify a single clinical study or trial that shows there is no risk of adverse reaction. See Gov. Memo. in Supp. at 17.

This line of argumentation fails to satisfy the Government's burden at the summary judgement stage because it calls for a weighing of expert testimony and credibility. See Kaytor,

609 F.3d at 545 (holding that "the court may not make credibility determinations or weigh the evidence" because "the drawing of legitimate inferences from the facts are jury functions"). The parties' dispute over the reasonableness of medical decision-making must be viewed in the light most favorable to Defendants. Id. Furthermore, both Defendants' expert Dr. Ehrenfeld and Plaintiffs' expert Dr. Flexner found that there was a legitimate medical basis for Dr. Asare's research methods and conclusions. See Pls. 56.1 ¶¶ 49–53, 57–63 (disputing Plaintiffs' characterization of Dr. Asare's research validity); ¶¶ 48, 52 (Dr. Ehrenfeld opined that severe sedation is "an actual risk" and "not an unreasonable concern" and that "[t]he specific interactions between antiretroviral medications and the drugs used by Dr. Asare . . . have been very poorly studied."); ¶¶ 49, 52 (Dr. Flexner stated that information about drug interactions could be found through internet search and that the potential for Dr. Asare's feared adverse drug reactions is low but nonzero).

Second, case law demonstrates that Dr. Asare's medical treatment decisions deserve wide deference and should be penalized only if his caution is found to be pretextual. In United States v. Univ. Hosp., 729 F.2d 144 (2d Cir. 1984), the Second Circuit declined to apply the ADA's analogous Rehabilitation Act to medical treatment decisions because such a policy would result in "lengthy litigation primarily involving conflicting expert testimony to determine whether a decision to treat, or not to treat, or to litigate or not to litigate, was based on a 'bona fide medical judgment.'" *Id*. at 157; see also Sumes v. Andres, 938 F. Supp. 9, 12 (D.D.C. 1996) ("[C]ourts should normally defer to the reasonable medical judgments of public health officials. However . . . a plaintiff may prevail if she can show that the reason given by defendant is a pretext[.]") (internal citations omitted). Plaintiffs' only proffered evidence of pretext takes the form of a battle of the experts that is inappropriate for a summary judgement motion and ignores the fact that Dr. Asare

has performed cosmetic surgery on an HIV+ patients not taking antiretroviral medications and that he has extensive experience in treating HIV+ patients in contexts other than cosmetic practice. See Pls. 56.1 ¶¶ 18, 49. Plaintiffs fail to show as a matter of law that the screening policy "is entirely without reasonable medical basis," or is pretext for unlawful discrimination against HIV+ individuals. Lesley v. Chie, 250 F.3d 47, 57 (1st Cir. 2001).

III. Defendants Have Not Failed to Make Reasonable Modifications Because All of Plaintiffs' Proposed Options Would Fundamentally Alter Defendants' Service.

Title III of the ADA penalizes "failure to make reasonable modifications to policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, [etc.] to individuals with disabilities, unless the entity can demonstrate that making such modifications would *fundamentally alter* the nature of such goods, services, facilities, [etc.]." 42 U.S.C. § 12182(b)(2)(A)(ii) (emphasis added). Plaintiffs claim that Dr. Asare violated the ADA because he failed to make an array of modifications to his screening policy and surgical procedures. However, Defendants dispute Plaintiffs' identified modifications as fundamentally altering the nature of Dr. Asare's work.

The first suggestion—that Dr. Asare could have changed the types or amounts of drugs he administers—is both a fundamental alteration and potentially harmful to patients. Dr. Asare is familiar with his chosen multiple drug cocktail and other cosmetic surgeons have described the results as "phenomenal." Pls. 56.1 ¶ 7. For Dr. Asare to attempt a new cocktail that he is not well versed in is asking him to experiment on his patients. This is bad medicine and no case law supports the irresponsible notion that the ADA requires a doctor to perform elective procedures using techniques with which he is unfamiliar. The Government also suggests that Dr. Asare could have employed an anesthesiologist to administer drugs or monitor the surgery or else could have provided a referral to other cosmetic surgeons. Such changes would fundamentally alter the

procedure as it would be an entirely different doctor providing the service; the result of this suggestion is no different than Dr. Asare's actual response to the prospective HIV+ patients—a recommendation that they receive the procedure elsewhere.

The Government harps upon the point that Dr. Asare did not conduct an "individual assessment." However, the very case law the Government cites belies this argument. The Government quotes United States v. Morvant, 898 F. Supp. 1157 (E.D. La. 1995), which found that a dentist's failure to treat HIV+ patients violated the ADA because he did not individually assess the patients' needs. Id. at 1166. In Morvant, the court found this refusal to be pretextual because "no additional infection control procedures—above and beyond universal precautions—are required to provide dental treatment to persons with HIV infection or AIDS." Id. at 1163. That finding is not analogous to Dr. Asare's practice where the fear does not concern disease transmission to others but rather risk to the patient. Avoidance of harm would not require universal precautions but rather a significant overhaul of the medical procedure. Dr. Asare performed an individual assessment insofar as he asked that patients what medications they were taking and tailored his practice around what drug interactions he was sure would not have adverse reactions.

A better analogy would be the commonly imposed height requirements for amusement park rides, which the Government cites as an example of a permissible safety requirement. See Gov. Memo. in Supp. at 16 (citing 28 C.F.R. Part 36, App. C at 916). The ride operator performs an individual assessment by evaluating the would-be rider's height. Amusement park-goers judged to be too short are turned away, even if their height is related to a protected status such as disability. Riders who are turned away are not provided referrals to other rides or entitled to a further individualized review of whether their age or their resistance to bone fracture or whiplash or any other such factor entitles them to the ride. Dr. Asare performs elective, cosmetic procedures and

neither the Government nor prospective patients can demand that he fundamentally alter his practice in ways that increase the risk of patient injury.

CONCLUSION

Because there are genuine disputes of material fact as to the meaning and character of Dr. Asare's communications, the legitimate medical basis for the screening policy, and the nondiscriminatory nature of the screening policy, Plaintiffs are not entitled to judgement as a matter of law. See Fed. R. Civ. P. 56(a). Accordingly, Plaintiff's motion for summary judgement must be denied.

Applicant Details

First Name	**Catherine**
Last Name	**Cazes**
Citizenship Status	**U. S. Citizen**
Email Address	**cec653@nyu.edu**
Address	**Address** Street **72 Perry Street, Apartment 4A** City **New York** State/Territory **New York** Zip **10014** Country **United States**
Contact Phone Number	**2018419690**

Applicant Education

BA/BS From	**Villanova University**
Date of BA/BS	**May 2018**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 20, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Annual Survey of American Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Estreicher, Samuel
samuel.estreicher@nyu.edu
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Richenthal, Daniel
daniel.richenthal@usdoj.gov
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cecilia.silver@brooklaw.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

CATHERINE ELIZABETH CAZES
72 Perry Street, Apt. 4A, New York, NY 10014
(201) 841-9690; Catherine.e.cazes@gmail.com

January 19, 2022

The Honorable Eric N. Vitaliano
United States District Court
Eastern District of New York
Theodore Roosevelt Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Judge Vitaliano,

I am writing to apply for a September 2023–24 clerkship with your chambers. I am a first-year litigation associate at Weil, Gotshal & Manges LLP in its Complex Commercial Litigation practice group. I graduated from the New York University School of Law in May 2021 where I was the Development Editor of Annual Survey of American Law.

During law school, I served as a judicial intern for Judge Joan M. Azrack of the Eastern District of New York and have since been eager to earn a clerkship. I have a passion for constitutional law and the federal courts, I believe that a few years of litigation experience in private practice will prepare me for a rigorous clerkship in your chambers.

Enclosed for your review are my résumé, law school and undergraduate transcripts, and writing sample. The writing sample is a draft habeas corpus opinion that I wrote while interning for Judge Azrack, included with her permission. Also enclosed are letters of recommendation from the following three people:

Professor Samuel Estreicher *Dwight D. Opperman Professor of Law*	samuel.estreicher@nyu.edu	(212) 998-6226
Professor Cecilia Silver *Director of Legal Research and Writing*	cecilia.silver@yale.edu	(203) 432-7803
Daniel Richenthal *Assistant United States Attorney*	daniel.richenthal@usdoj.gov	(917) 836-0978

Thank you for your careful review of my application materials. Please let me know if I can provide any additional information, and I look forward to further communication.

Respectfully,

Catherine E. Cazes

CATHERINE ELIZABETH CAZES
72 Perry Street, Apartment 4A, New York, NY 10014
(201) 841-9690; catherine.e.cazes@gmail.com

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Juris Doctor, May 2021
Honors: Schulte Roth & Zabel Prize, a faculty-nominated award for excellence in employment and employee benefit law
Annual Survey of American Law, Development Editor
Activities: Tutor for Evidence; Criminal Procedure: Fourth and Fifth Amendments
Engagements: Second Annual NYU Labor Center's Student Scholarship Webinar, presented gender discrimination scholarship
Transfer: Brooklyn Law School; Academic Year 2018–2019; GPA: 3.766; Class Rank: Top 9.7%
Brooklyn Law Review, Invitation Extended; Dean's List; Moot Court Honor Society; CALI Excellence for the Future Award in Fundamentals of Law Practice (legal writing) I & II; Carswell Scholarship; Lark-Barranco Scholarship; Student Notetaker

VILLANOVA UNIVERSITY, Villanova, PA
Bachelor of Arts in Political Science, *cum laude*, minors in English and Psychology, May 2018
GPA: 3.55
Honors: Dean's List; National Society of College Scholars
Activities: Women's Rowing Division I; Alpha Phi, Eta Epsilon Chapter

EXPERIENCE

WEIL, GOTSHAL & MANGES LLP, New York, NY
Associate, October 2021–Present; ***Summer Associate***, June 2020–August 2020
Associate in the Complex Commercial Litigation department. Prepares for various oral arguments, including successfully defeating a summary judgment motion in the Middle District of Georgia. Conducts extensive legal research on a broad array of issues across various disciplines, particularly involving questions of Constitutional Law, drafts legal research memos.

UNITED STATES ATTORNEY'S OFFICE, S.D.N.Y., New York, NY
Extern, Criminal Division, August 2020–December 2020
Worked with mentor AUSAs in conducting legal investigations, analyzing possible charges under a variety of statutes, writing legal memoranda, and drafting sentencing submissions and oppositions to motions. Spoke with agents and opposing counsel, attended court proceedings, listened in on proffers and appellate arguments.

PROFESSOR CECILIA A. SILVER, BROOKLYN LAW SCHOOL, Brooklyn, NY
Research Assistant, May 2019–September 2020
Researched the interaction between museum curatorial policies and legal pedagogy for a forthcoming journal article. Culled notes from a variety of sources, read and edited numerous drafts for substance and style, and gave extensive feedback on written work.

PROFESSOR ALICE BURKE, NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Teaching Assistant, August 2019–December 2019
Taught fundamentals of legal writing, citation, research, and argument to students. Reviewed drafts of legal memoranda, provided feedback, met with students. Regularly answered student questions on legal writing.

THE HONORABLE JOAN M. AZRACK, U.S. DISTRICT COURT, E.D.N.Y., Brooklyn, NY
Judicial Intern, May 2019–August 2019
Researched legal issues and wrote and revised draft opinions on both civil and criminal matters. Drafted a habeas corpus and a Social Security opinion and edited memoranda. Attended trial proceedings, scheduling conferences, arraignments, and oral argument. Discussed legal issues with Judge Azrack.

PROFESSOR WILLIAM D. ARAIZA, BROOKLYN LAW SCHOOL, Brooklyn, NY
Research Assistant, May 2019–August 2019
Researched the Nondelegation Doctrine and drafted memoranda analyzing arguments favoring broad delegation to agencies for the following publication: William D. Araiza, *Toward a Non-Delegation Doctrine That (Even) Progressives Could Like*, in 3 SUPREME COURT PREVIEW 2018–2019 211–251 (Steven D. Schwinn ed., American Constitution Society 2020), *available at* https://www.acslaw.org/analysis/acs-supreme-court-review/toward-a-non-delegation-doctrine-that-even-progressives-could-like/.

ADDITIONAL INFORMATION

Interests include tennis, Pilates, the New York Times crossword puzzles and Spelling Bee, and Jeopardy!.

07/02/19 Page: 1 of 1 Print Date:

Ms. Catherine E. Cazes
358 Naughright Rd.
358 Naughright Road
Long Valley NJ 07853

Student Name: Catherine Elizabeth Cazes
Student ID..: 0414312 Class: 2F

	Courses	Cred Att	Grd	Grad Crs	GPA Calc	Faculty
	Fall 2018					
CRM 100	D7S Criminal Law	3.00	A-	3.00	11.01	A. Ristroph
LWR 100	D13 Fundamentals of Law Practice	2.00	A+	2.00	8.66	C. Silver
TRT 100	D4 Torts	4.00	A	4.00	16.00	E. Janger
CPL 102	D4 Civil Procedure	5.00	A-	5.00	18.35	C. Kim
Sem GPA 3.859	Cum GPA 3.859	14.00		14.00	54.02	
	Spring 2019					
CLT 100	D3 Constitutional Law	5.00	A+	5.00	21.65	W. Araiza
CTL 100	D3 Contracts	5.00	B+	5.00	16.65	L. Solan
PTE 100	D4 Property	4.00	B	4.00	12.00	B. Jones-Woodin
LWR 101	D13 Fundamentals of Law Pract. 2	2.00	A+	2.00	8.66	C. Silver
Sem GPA 3.685	Cum GPA 3.766	16.00		16.00	58.96	

END OF THIS TRANSCRIPT

Credits Attempted: 30 Credits Completed: 30 Credits toward GPA: 30 GPA Grade Points: 112.98 GPA: 3.766
Comments: NO COMMENTS

Name: **Catherine E Cazes**
Print Date: **06/08/2021**
Student ID: **N11045286**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Degrees Awarded

Juris Doctor 05/19/2021
School of Law
Major: Law

Transfer Credits

Transfer Credit from Brooklyn Law School
Applied to Fall 2019

Course	Description	Units
CLT 100	Constitutional Law	5.0
CPL 102	Civil Procedure	5.0
CRM 100	Criminal Law	3.0
CTL 100	Contracts	5.0
LWR 100	Fundamentals of Law Practice	2.0
LWR 101	Fundamentals of Law Pract. 2	2.0
PTE 100	Property	4.0
TRT 100	Torts	4.0
	Transfer Totals:	30.0

Fall 2019

School of Law
Juris Doctor
Major: Law

Criminal Procedure: Fourth and Fifth Amendments	LAW-LW 10395	4.0	A-
Instructor: Stephen J Schulhofer			
Corporations	LAW-LW 10644	4.0	B
Instructor: Ryan J Bubb			
Teaching Assistant	LAW-LW 11608	1.0	CR
Instructor: Alice Estill Burke			
Legislation and the Regulatory State	LAW-LW 11633	4.0	B+
Instructor: Samuel Estreicher			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	13.0	43.0

Spring 2020

School of Law
Juris Doctor
Major: Law

--
Due to the COVID-19 pandemic, all spring 2020 NYU School of Law (LAW-LW.) courses were graded on a mandatory CREDIT/FAIL basis.
--

Complex Litigation	LAW-LW 10058	4.0	CR
Instructor: Troy A McKenzie			
Employment Law	LAW-LW 10259	4.0	CR
Instructor: Samuel Estreicher			
Evidence	LAW-LW 11607	4.0	CR
Instructor: Daniel J Capra			
Employment Law: Writing Credit	LAW-LW 11834	0.0	CR
Instructor: Samuel Estreicher			

	AHRS	EHRS
Current	12.0	12.0
Cumulative	25.0	55.0

Fall 2020

School of Law
Juris Doctor
Major: Law

Trusts and Estates	LAW-LW 10474	4.0	B+
Instructor: Bridget Crawford			
Prosecution Externship - Southern District	LAW-LW 10835	2.0	A
Seminar			
Instructor: Anna M Skotko, Janis Echenberg			
Prosecution Externship - Southern District	LAW-LW 11207	3.0	CR
Instructor: Anna M Skotko, Janis Echenberg			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	B+
Instructor: William E Nelson			
Federal Courts and the Federal System	LAW-LW 11722	4.0	A-
Instructor: Trevor W Morrison			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	40.0	70.0

Spring 2021

School of Law
Juris Doctor
Major: Law

Survey of Securities Regulation	LAW-LW 10322	4.0	CR
Instructor: James B Carlson			
Annual Survey of American Law	LAW-LW 10727	2.0	CR
Directed Research Option A	LAW-LW 10737	2.0	A+
Instructor: Samuel Estreicher			
Survey of Intellectual Property	LAW-LW 10977	4.0	B
Instructor: Barton C Beebe			
The Elements of Criminal Justice Seminar	LAW-LW 12632	2.0	B+
Instructor: Preet Bharara			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	54.0	84.0

Staff Editor - Annual Survey of American Law 2019-2020
Development Editor - Annual Survey of American Law 2020-2021

End of School of Law Record

New York University
A private university in the public service

School of Law Faculty of Law

40 Washington Square South
New York, NY 10012-1099
Telephone: (212) 998-6226
Facsimile: (212) 995-4341/4657
Email: samuel.estreicher@nyu.edu

SAMUEL ESTREICHER
Dwight D. Opperman Professor of Law
Director, Center for Labor & Employment Law
Co-Director, Institute of Judicial Administration

Dear Judge:

It is my pleasure to write on behalf of Catherine E. Cazes, who will be graduating from NYU Law in May 2021 and is seeking a clerkship in your chambers.

A transfer from Brooklyn Law School, she has excelled here. In our first meetings in fall 2019, she was one of the top two students in the mandatory course I give, Legislation and the Regulatory State for transfer students and LL.M. candidates. She is very smart, hard-working, and always ready to shed light on the class discussion. She is able to combine insight and good practical judgment. She is also a very effective writer.

In spring 2020, she took my course in employment law, the grade for which was based entirely on class performance at which she is a standout, and a research paper. Her paper explores the various causes of pay inequity and what can be done to improve the situation in terms of policy changes. She has completed a thorough first draft which is outstanding. She is taking an additional two points in directed research to finish work on the paper.

Because I believe Catherine is an outstanding person and outstanding young lawyer, I urge you to interview and hire her. She is sure bet.

If you need additional information, please do not hesitate to contact me.

Sincerely,

Sam Estreicher

Samuel Estreicher

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

February 11, 2021

Re: Clerkship Application of Catherine E. Cazes

Dear Judge:

I write in support of Catherine Cazes's application to serve as a law clerk. Catherine is hard-working, personable, bright, and enthusiastic about learning and contributing. She would be an asset to Your Honor's chambers.

Over the past nearly eleven years, I have had the opportunity to work with and supervise a number of externs in my capacity as an Assistant United States Attorney in the Criminal Division of the United States Attorney's Office for the Southern District of New York, both in my present position, as Senior Trial Counsel in the Public Corruption Unit, and during my time in the General Crimes and Narcotics Units. Catherine, who served as an extern during the Fall 2020 semester, was one of the best.

From the moment Catherine started, it was clear that she was enthusiastic about the externship—and for the right reasons, because she was curious about the work of the Office and wanted both to gain experience and to contribute. Catherine was interested in seeing and sitting in on as much as she could, both in and out of court, regardless of the nature or profile of the case. She also was willing to take on any task, and worked late or on weekends without being asked. One could not ask for a better attitude from an extern.

Nor could one ask for one with better interpersonal skills. Catherine was unfailingly professional, respectful, and friendly, engaging well with individuals with different roles, such as paralegals or agents. She also showed a good sense of humor (complete with referring to my use of a SoulCycle-at-home bike as engaging in a "séance," since SoulCycle's online classes often have odd or variable lighting, as compared to Peloton's online classes, which she prefers). And importantly, this was all apparent notwithstanding that we worked together during the ongoing pandemic, which meant that we met in person only once. That undoubtedly made for a more difficult experience for her, but that difficulty did not affect her attitude.

Catherine combined her enthusiasm and interpersonal skills with a bright mind and an attention to detail. During her internship, I asked Catherine to assist with several tasks. Among other projects, in connection with motions by inmates for compassionate release in light of the risk of COVID-19 in prison, I asked Catherine to review voluminous medical records to determine whether the inmates had certain conditions, and if so, whether we could discern the severity of those conditions. She worked quickly and comprehensively, helping not just to

analyze the records but also to compare them to factual assertions in the motions to which we needed to respond. In short, Catherine was comfortable not just with doing legal research, but also with reviewing documents to try to ascertain facts and test them against claims in a legal submission, an important skill when serving as a law clerk.

Finally, Catherine did not only ask questions when they would assist her with a project. She also asked questions arising from her sitting in on the work of the Office, such as a proffer or a conversation about strategy, demonstrating that she was thinking about what she was seeing and hearing, and wanted to learn how that fit into the law, policy, and practice. And importantly, those questions, and her reaction to my answers, demonstrated that she was engaged in critical thinking and had good judgment. Those qualities will serve her well as a law clerk, and beyond.

Please do not hesitate to contact me if you have any questions or would like to discuss Catherine's application.

Very truly yours,

_____

Daniel C. Richenthal
Senior Trial Counsel
Assistant United States Attorney
daniel.richenthal@usdoj.gov
(212) 637-2109

Brooklyn Law School
ESTABLISHED 1901

Cecilia A. Silver
Assistant Professor of Legal Writing

250 Joralemon Street
Brooklyn, NY 11201
Phone: (718) 780-0640
Email: cecilia.silver@brooklaw.edu

January 7, 2021

Re: Recommendation for Catherine Cazes

Dear Judge :

I am delighted to support Cat Cazes's application for a law clerk position in your chambers. Recommending her for your consideration is an honor and a pleasure. Cat was far and away the best student in my 2018-19 Fundamentals of Law Practice class, earning CALI accolades and an A+ both semesters. In fact, she is one of the strongest writers I have had in any of my classes in my decade-long academic career spanning Penn, Brooklyn, and Cardozo. Cat combines intellectual depth, exceptional maturity, polished writing skills, high energy, and good humor.

Before Brooklyn revamped its 1L legal writing curriculum in Fall 2019, the Fundamentals of Law Practice was a mandatory first-year course that offered practical training in real-world writing and communication skills. Besides giving students a solid foundation in legal research, analysis, and writing, the program exposed students to a broader array of the skills young lawyers need in the workplace, including negotiation and email drafting. Students also worked closely with primary documents and completed a summary judgment brief to more accurately reflect the reality students will face in their careers as litigators. To accomplish these goals, the course presented a series of connected assignments as realistic simulations to help students better understand the context in which these skills are deployed and creatively explore the roles of attorneys in shaping and applying legal doctrine.

From the outset, Cat's papers were consistently superb: her research extensive, her analysis rigorous, her writing clear and compelling. Her understanding of legal nuances far outstripped her peers, and she made persuasive comparisons to precedent cases to craft well-written, cogent memos and briefs. But more importantly, Cat has a real knack for the storytelling aspect of brief writing. For the summary judgment brief, she selected evocative nuggets of testimony, chose vivid verbs, and deftly downplayed unfavorable facts using paragraph and sentence structure to create a convincing narrative. Rather impressively, Cat understands not only how to advance her affirmative position but also how to integrate the legal standard into the body of her brief to show the myriad genuine

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cecilia.silver@brooklaw.edu

issues of material fact precluding summary judgment. Her brief was easily the best piece of writing I read all year.

Cat was not only an exemplary student, but she also was an active, well-rounded member of the Brooklyn Law community. Despite being a busy 1L acclimating to law school, she helped classmates with learning difficulties by furnishing notes for their courses. In addition, Professor Bill Araiza recognized Cat's meticulousness by selecting her to serve as his research assistant. And, unsurprisingly, the Moot Court Honor Society agreed with my assessment of Cat's abilities and invited her to join both the Trial and Appellate Divisions—a rare feat given the competitive pool of student applicants.

Along with her academic and extracurricular achievements, Cat is a person of commitment and character. Given her stellar performance in Fundamentals of Law Practice, I hired her to be my research assistant to help develop an article on museum pedagogy's implications for the law school classroom. Cat was conscientious, balancing her summer work obligations to me, Professor Araiza, and Judge Azrack with aplomb. But the real testament to Cat's integrity was when she volunteered to continue—uncompensated—with her research even though she transferred to NYU because she was devoted to me and the project. She is loyal and dependable—a true find.

Cat has all the gifts to be a great law clerk. I vividly recall from my tour as a law clerk for Judge Griesa in the Southern District of New York that he valued diligence and thoroughness above all other attributes. An eager and thoughtful class contributor, Cat was well prepared, inquisitive, and attentive, always willing to do what it takes to produce top-quality work product. She is a self-directed learner and has a deep desire to continually improve. And even though Cat's writing was excellent from the start, she keenly sought guidance on how to develop her skills further. Cat regularly attended office hours, often coming to me with a list of questions on a fully developed draft weeks before the deadline. Her enthusiasm, professionalism, dedication, and motivation would make her a tremendous asset to your chambers.

Besides teaching Cat, over the past two-and-a-half years, I have had the opportunity to talk with her from time to time about cabbages and kings. In those conversations, she displays a span of interest and perceptiveness that can only benefit the decision-making process. But perhaps most critically, I admire Cat's great personal qualities: her poise, modesty, warmth, and wonderfully dry sense of humor. I know that her future will be rich with opportunities and that she will meet every challenge she pursues. I recommend her wholeheartedly.

In short, Cat is the "real deal." Thank you for considering this letter with Cat's application. If I can provide any additional information, or if you wish to give me the opportunity to embellish on this praise, please do not hesitate to contact me.

Sincerely yours,

Cecilia A. Silver

WRITING SAMPLE

CATHERINE ELIZABETH CAZES
20 Exchange Place, Apt. 314, New York, NY 10005
(201) 841-9690; cec653@nyu.edu

During my time as a judicial intern for the Honorable Joan M. Azrack of the Eastern District of New York, I prepared the following habeas corpus draft opinion, now published on Westlaw and appended with the permission of Judge Azrack. While the entire document is attached for context, most indicative of my writing is the Discussion portion, beginning on page six and ending on page seventeen.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
GUILLERMO ALVARADO AJCÚC,

Petitioner,

-against-

THE PEOPLE OF THE STATE
OF NEW YORK,

Respondent.
----------X

For Online Publication Only

MEMORANDUM AND ORDER
18-CV-00183

AZRACK, United States District Judge

Petitioner, Guillermo Alvarado-Ajcúc (the "Petitioner"), proceeding pro se, petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (ECF No. 1, the "Petition.") Following a jury trial in Suffolk County Court, Petitioner was convicted of two counts of Murder in the Second Degree: Intentional Murder (N.Y. Penal Law § 125.25(1)) and Felony Murder (N.Y. Penal Law § 125.25(3)). On July 15, 2014, Petitioner was sentenced to two indeterminate terms of twenty-five years to life in prison, to run concurrently. He is presently incarcerated.

In the instant Petition, Petitioner asserts three grounds for habeas relief: (1) failure to charge the jury with Manslaughter in the Second Degree as a lesser included offense of Murder in the Second Degree; (2) failure to prove Petitioner's guilt of Felony Murder beyond a reasonable doubt, and that the verdict was against the weight of the evidence; and (3) his sentence is unduly harsh and excessive. (Pet., at 2.) All of Petitioner's claims were exhausted and adjudicated on the merits on direct appeal in state court. For the following reasons, the Petition is DENIED in its entirety.

I. BACKGROUND

A. Factual Background

Petitioner's convictions stem from the murder of a woman in Riverhead, New York on May 6, 2012. The evening before, Saturday, May 5, 2012, the victim was at the Sabor Latino bar in Riverhead. (Trial Tr. I, May 15–20, 2014, ECF No. 4-17, 375:3–21.) Throughout the night, witnesses reported that the victim was drinking and appeared intoxicated. (Id. at 142:16–25, 143:2–3, 381:2–3.) That same night, Petitioner went to Sabor Latino to watch a boxing fight. (Id. at 375:3–21.)

In the early morning hours of May 6, 2012, video surveillance showed Petitioner and the victim walking away from the bar together. (Id. at 108:2–9, 111:15–18, 189:6–10.) Later that morning, between 10:00 and 11:00 a.m., Petitioner went to a local deli and expressed to an individual named Rigoberto Coslaya ("Coslaya") that he feared he had hurt a girl earlier that morning. (Id. at 403–06.) At trial, Coslaya testified that Petitioner told him that he left the victim in the woods and did not know whether she was dead or alive. (Id. at 406:16–19, 412:7–13:2–6.)

On Monday, May 7 at 8:15 a.m., an employee of the Department of Motor Vehicles Office, which was located in the same shopping center as Sabor Latino, saw the victim's body in the ditch of a brushy area adjacent to the parking lot. (Id. at 31:15–21, 32:7–13, 33:11–21, 35:4–13.) The victim was face down with her pants and underwear pulled down around her ankles. (Id. at 33–34, 47:16–18.) Once the Medical Examiner arrived at the scene, the victim's body was rolled over, revealing markings on her neck. (Id. at 237:3–6, 265:2–18.)

The autopsy report showed that the victim had injuries consistent with neck compression, including a nearly horizontal line that ran from the right side of her neck, across the midline, to the left side. (Trial Tr. II, May 21–30, 2014, ECF No. 4-18, 558:2–60:12–16, 578:13–21.) The victim

also had petechial hemorrhages around her eyes and cheeks, consistent with strangulation. (Id. at 558:2–17, 559:17–60:2.) These findings, coupled with constricted blood vessels in the victim's brain, led the Medical Examiner to conclude that the victim died as a result of neck compression from strangulation that lasted over several minutes. (Id. at 564:18–65:2–17, 584–85.) The sexual assault kit performed during the autopsy showed no semen or male DNA; however, Petitioner's DNA was found under the victim's fingernails. (Id. at 645:8–22, 651:14–21, 656:10–67:2–25; Trial Tr. I, ECF No. 4-17, 307:25–08:2–9.)

When Coslaya learned of the victim's death, he spoke to the police regarding his conversation with Petitioner at the deli the morning of May 6. (Trial Tr. II, ECF No. 4-18, 426:6–8; Trial Tr. I, ECF No. 4-17, 407:6–8.) The police met with Coslaya at his cousin's house on May 7 and obtained a still image from surveillance footage taken at the deli on the morning of May 6. (Trial Tr. II, ECF No. 4-18, 426:6–8, 427:6–11; Trial Tr. I, ECF No. 4-17, 414:9–14.) The image depicted Petitioner at the deli. (Trial Tr. II, ECF No. 4-18, 427:20–28:2–3.)

On May 16, two detectives from the Suffolk County Police Department Homicide Bureau, Detective Tulio Serrata and Detective Thomas Walsh, approached Petitioner outside his home. (Id. at 426:9–27:2–5.) The detectives showed Petitioner the surveillance photo from the deli. (Id. at 427:6–11.) After Petitioner confirmed that he appeared in the photo, the detectives told Petitioner that they were investigating the death of the victim and asked him to accompany them to the precinct for an interview. (Id. at 427:12–19, 501:4–7.) Petitioner agreed. (Id. at 501:8–11.)

On the way to the Riverhead Police Department, Detective Serrata read Petitioner his Miranda warnings in Spanish off a rights card.[1] (Id. at 429:2–18.) Petitioner waived his rights in Spanish, placed his initials next to each right on the card, and signed his name on the bottom of

[1] Petitioner moved from Guatemala to the United States and speaks Spanish. (See ECF No. 4-5; Trial Tr. II, ECF No. 4-18, 504:3–8.) Detective Serrata is also a fluent Spanish speaker. (Trial Tr. II, ECF No. 4-18, 437:22–38:2–9.)

the card. (Id. at 429–30:2–6, 432–33:2–8.) Detective Serrata told Petitioner that he was the last person to see the victim alive, to which Petitioner responded that he was not trying to hurt the victim. (Id. at 434:11–17.) Following this statement, Detective Serrata told Petitioner that he was under arrest. (Id.)

Petitioner was interrogated by Detective Serrata and Detective Walsh for six hours at the Riverhead Police Department. (Id. at 443:21–44:2.) During the course of interrogation, which was recorded, Detective Serrata spoke to Petitioner in Spanish and translated to Detective Walsh in English. (Id. at 436:6–37:2–6, 511:16–20.) When asked by Detective Serrata how Petitioner killed the victim, Petitioner responded, "with the belt," and demonstrated to the detectives how he looped his belt around the victim's neck. (Interview Tr., ECF No. 4-11 at 32–33.)

At the end of the interrogation, Petitioner signed a statement that was written by Detective Serrata in English and read to Petitioner by Detective Serrata in Spanish. (Id. at 99; ECF No. 4-5, the "Confession.") The Confession stated that Petitioner forced himself onto the victim, taking her pants off and putting his penis in her vagina before taking off his belt and choking her by wrapping it around her neck until she became unconscious, and then he left her there dead. (ECF No. 4-5; Interview Tr., ECF No. 4-11 at 99.) Petitioner signed the statement and swore to its truth. (Id.) After signing the Confession, Petitioner was photographed. (Trial Tr. I, ECF No. 4-17, 83:8–15; Trial Tr. II, ECF No. 4-18, 465:4–14.) The photographs depict a rash consistent with poison ivy on Petitioner's neck, and healing scabs down his forearms consistent with recent scratches. (Trial Tr. I, ECF No. 4-17, 83:8–84:2–13, 85–86:2–15.) Petitioner consented to a buccal swab and gave the police permission to go to his house to collect the clothing he was wearing at the time of the crime. (Id. at 351:12–17; Trial Tr. II, ECF No. 4-18, 460:15–61:2–11; Interview Tr. at 10).

B. Procedural History

1. Trial and Sentencing

Prior to trial, the Suffolk County Court held a Huntley hearing on February 25-26, 2013 to determine the admissibility of Petitioner's oral and written statements made to Detective Serrata, as well as whether Petitioner voluntarily gave the buccal swab. (Huntley Hearing, Feb. 25–26, 2013, ECF No. 4-15.) On March 29, 2013, the court found that all statements made to Detective Serrata, and the buccal swab, were given voluntarily and therefore were admissible at trial. (Huntley Decision, Mar. 29, 2013, ECF No. 4-8 at 45–47.)

On May 30, 2014, upon conclusion of the two-week-long trial, the jury found Petitioner guilty of two counts of Murder in the Second Degree: Intentional Murder (N.Y. Penal Law § 125.25(1)) and Felony Murder (N.Y. Penal Law § 125.25(3)).[2] (Trial Tr. II, ECF No. 4-18, 864:15–65:2.) On July 15, 2014, Petitioner was sentenced to two indeterminate terms of twenty-five years to life in prison, to run concurrently. (Sentencing Tr., July 15, 2014, ECF No. 4-16 at 15.)

2. Direct Appeal

Petitioner, through counsel, appealed his conviction and sentence to the New York Appellate Division, Second Department (the "Appellate Division"). (Notice of Appeal, ECF No. 4-8 at 85.) On appeal, Petitioner raised three arguments, discussed infra. (Appellant Mem., ECF No. 4-2 at 5.) On September 21, 2016, the Appellate Division affirmed Petitioner's conviction and sentence. See People v. Alvaradoajcuc, 142 A.D.3d 1094, 1095, 37 N.Y.S.3d 589, 591 (2d Dep't 2016). On December 7, 2016, the New York State Court of Appeals denied Petitioner's application for leave to appeal. People v. Alvaradoajcuc, 28 N.Y.3d 1122, 73 N.E.3d 359 (2016).

[2] The predicate felony for the felony murder count was Rape in the First Degree (N.Y. Penal Law § 135.50).

Petitioner has not pursued any post-conviction collateral relief at the state level. (Pet., at 5, 25–26.)

3. The Instant Petition

In November 2017, Petitioner, proceeding pro se, timely filed his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.[3] (Id. at 38.) Petitioner raises the same grounds for relief as were raised on direct appeal.[4] (Id. at 5, 17, 26.)

II. DISCUSSION

A. Standards of Review

1. AEDPA Standard of Review

Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), to restrict "the power of federal courts to grant writs of habeas corpus to state prisoners." Williams v. Taylor, 529 U.S. 362, 399 (2000) (O'Connor, J., concurring). Under AEDPA, a district court will "entertain an application for a writ of habeas corpus [on] behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

If a state court reached the merits of the claim, a federal court may not grant a writ of habeas corpus unless the state court's adjudication of the claim either:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

[3] The Court received the Petition on January 9, 2018. (See Pet., at 1.)
[4] Indeed, it appears Petitioner included in his Petition the exact pages from his appellate brief raising these arguments. (See Pet., at 2; Appellant Mem. at 5.)

28 U.S.C. § 2254(d). The Supreme Court has construed AEDPA "to give independent meaning to 'contrary [to]' and 'unreasonable.'" Jones v. Stinson, 229 F.3d 112, 119 (2d Cir. 2000).

A state court's decision is "contrary to" clearly established federal law if "the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." Williams, 529 U.S. at 412–13 (O'Connor, J., concurring). A decision involves "an unreasonable application of" clearly established federal law when a state court "identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of [a] prisoner's case." Id. at 413. This standard does not require that all reasonable jurists agree that the state court was wrong. Id. at 409–10. Rather, the standard "falls somewhere between 'merely erroneous and unreasonable to all reasonable jurists.'" Jones, 229 F.3d at 119 (quoting Francis S. v. Stone, 221 F.3d 100, 109 (2d Cir. 2000)).

AEDPA "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." Jones v. Murphy, 694 F.3d 225, 234 (2d Cir. 2012) (quoting Hardy v. Cross, 565 U.S. 65, 66 (2011) (per curiam)). This standard is "difficult to meet." White v. Woodall, 572 U.S. 415, 419 (2014) (quoting Metrish v. Lancaster, 569 U.S. 351, 357–58 (2013)), reh'g denied, 573 U.S. 927 (2014). A petitioner must show that the "state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 419–20.

Furthermore, a state court's determinations of factual issues are "presumed to be correct," and the petitioner has "the burden of rebutting the presumption of correctness by clear and

convincing evidence presented in the state court proceeding." 28 U.S.C. § 2254(e)(1); see also Lynn v. Bliden, 443 F.3d 238, 246–47 (2d Cir. 2006). A state court's finding of fact will be upheld "unless objectively unreasonable in light of the evidence presented in the state court proceeding." Lynn, 443 F.3d at 246–47 (quoting Miller-El v. Cockrell, 537 U.S. 322, 340 (2003)). Thus, a federal court may overrule a state court's judgment only if "after the closest examination of the state-court judgment, a federal court is firmly convinced that a federal constitutional right has been violated." Williams, 529 U.S. at 389.

2. Petitioner's Pro Se Status

Petitioner "bears the burden of proving by a preponderance of the evidence that his constitutional rights have been violated." Jones v. Vacco, 126 F.3d 408, 415 (2d Cir. 1997). But, in light of his pro se status, the Court will construe his submissions liberally and interpret them to "raise the strongest arguments that they suggest." Kirkland v. Cablevision Sys., 760 F.3d 223, 224 (2d Cir. 2014) (per curiam) (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994)). However, Petitioner is not excused from "compliance with relevant rules of procedural and substantive law." Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983) (quoting Birl v. Estelle, 660 F.2d 592, 593 (5th Cir. 1981) (per curiam) (internal quotation marks omitted)).

B. Claims for Relief

Petitioner raises three claims in support of his Petition for a writ of habeas corpus:

> (1) "It was error for the trial judges to refuse to charge manslaughter in the second degree as requested by the defendant since there was a reasanable [sic] view of the evidence that he may have been guilty of the lesser crime and not the greater."
>
> (2) "The [P]eople failed to prove appellant's guilt of felony murder beyond a reasonable doubt and the verdict was against the weight of the evidence."
>
> (3) "The sentence imposed by the court of twenty-five years to life concurrent for each conviction of murder in the second degree was harsh and excessive and should be modified in the interest of justice."

(Pet., at 5, 17, 26.) None of these claims present a basis for habeas corpus relief.

1. Ground One - Failure to Charge the Jury with the Lesser Included Offense of Manslaughter in the Second Degree

At trial, the court refused Petitioner's request to charge the jury with Manslaughter in the Second Degree under N.Y. Penal Law § 125.15(1) (Reckless Manslaughter) as a lesser included offense of Murder in the Second Degree under N.Y. Penal Law § 125.25(1) (Intentional Murder). The jury ultimately convicted Petitioner of Murder in the Second Degree. Petitioner asserts now, as he did on direct appeal, that failing to charge the jury with the lesser included offense was error, and claims it entitles him to federal habeas corpus relief. (Pet., at 5.)

On direct appeal, the Appellate Division found that the trial court properly refused to instruct the jury concerning the lesser included offense, because when "viewing the evidence in the light most favorable to the defendant, there is no reasonable view of the evidence which would support a finding that the defendant's conduct was merely reckless, or that he intended anything other than to kill the victim." Alvaradoajcuc, 142 A.D.3d at 1094, 37 N.Y.S.3d at 591.

"Neither the Supreme Court nor [the Second Circuit] has decided whether the failure to instruct the jury on lesser included offenses in noncapital cases is a constitutional issue that may be considered on a habeas petition." Knapp v. Leonardo, 46 F.3d 170, 179 (2d Cir. 1995); see also Sostre v. Lee, No. 11-CV-3439, 2013 WL 3756474 at *7 (E.D.N.Y. July 15, 2013) (holding that a trial court's refusal to charge a lesser included offense is not cognizable under 28 U.S.C. § 2254(d)(1)). Given the unsettled nature of federal law in this area, a claim that a state trial court erred in failing to instruct the jury on a lesser included offense in a non-capital case like Petitioner's is not cognizable in a habeas corpus proceeding. See Bonilla v. Lee, 35 F. Supp. 3d 551, 569 (S.D.N.Y. 2014) (citing Jones v. Hoffman, 86 F.3d 46, 48 (2d Cir. 1996) (finding that because a

habeas petition cannot be used to apply a new rule of law, a claim for failure to include a lesser included offense in a noncapital case is precluded from review)). Accordingly, Petitioner's first claim is denied as it cannot form a basis for habeas relief.

2. Ground Three - Harsh and Excessive Sentence

Petitioner also claims, as he did on direct appeal, that the sentence imposed by the trial court of two indeterminate terms of incarceration of twenty-five years to life, to run concurrently, was unduly harsh or excessive. (Pet., at 3.) The Appellate Division held that "[t]he sentence imposed was not excessive." Alvaradoajcuc, 142 A.D.3d at 1095, 37 N.Y.S.3d 589 at 591. It is well settled that an excessive sentence claim, such as Petitioner's, does not present a federal constitutional issue when the received sentence "is within the range prescribed by state law." White v. Keane, 969 F.2d 1381, 1383 (2d Cir. 1992); see also Taylor v. Connelly, 18 F. Supp. 3d 242, 268 (E.D.N.Y. 2014) (noting same).

Under New York state law, Petitioner could have received a maximum sentence of twenty-five years to life had he been convicted of either count of Murder in the Second Degree (Intentional Murder or Felony Murder). N.Y. Penal Law §§ 125.25(1); 125.25(3). Accordingly, Petitioner's sentence of two indeterminate terms of twenty-five years to life imprisonment, to run concurrently, was within statutory parameters and does not present a federal constitutional issue. Thus, this claim similarly fails to present any grounds for federal habeas corpus relief.

3. Ground Two - Failure to Prove Felony Murder Beyond a Reasonable Doubt and Verdict Was Against the Weight of Evidence

Petitioner's final claim for habeas corpus relief is that the People failed to prove his guilt of felony murder beyond a reasonable doubt, and the verdict was against the weight of the evidence.[5] (Pet., at 3.)

On direct appeal, the Appellate Division ruled that Petitioner's conviction was not against the weight of the evidence, and that in viewing the evidence in the light most favorable to the prosecution, it was legally sufficient to establish the defendant's guilt of felony murder beyond a reasonable doubt. Alvaradoajcuc, 142 A.D.3d at 1095, 37 N.Y.S.3d at 591. In so concluding, the Appellate Division "conduct[ed] an independent review of the weight of the evidence," but "accord[ed] great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor." Id.

Only Petitioner's claim that the People failed to prove his guilt beyond a reasonable doubt presents a cognizable claim for federal habeas corpus relief. Unlike a legal sufficiency claim, which is based on federal due process principles, "[a] 'weight of the evidence' claim is a pure state law claim grounded in New York Criminal Procedure Law § 470.15(5)." Correa v. Duncan, 172 F. Supp. 2d 378, 381 (E.D.N.Y. 2001). Assessments of the weight of the evidence are thus not federally cognizable grounds for habeas corpus relief. McKinnon v. Superintendent, Great Meadow Corr. Facility, 422 F. App'x 69, 75 (2d Cir. 2011) ("[T]he argument that a verdict is against the weight of the evidence states a claim under state law, which is not cognizable on habeas corpus."); see also Flores v. Ercole, No. 06-CV-6751, 2010 WL 1329036, at *8 (E.D.N.Y. Mar. 31, 2010) (noting same).

[5] Notably, Petitioner does not challenge his conviction of Intentional Murder under N.Y. Penal Law § 125.25(1), either as against the weight of the evidence, or on legal sufficiency grounds.

For the reasons set forth below, the Court concludes that the Appellate Division's ruling that the evidence was legally sufficient to establish Petitioner's guilt of felony murder beyond a reasonable doubt was neither contrary to, nor an unreasonable application of, clearly established federal law, nor was it an unreasonable determination of the facts in light of the record. Thus, this final claim does not entitle Petitioner to habeas relief.

i. Legal Standard

In reviewing a federal habeas corpus challenge to the evidentiary sufficiency of a state criminal conviction, the Court asks "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1970) (internal citations and quotations omitted) (emphasis in original); see also Ponnapula v. Spitzer, 297 F.3d 172, 179 (2d Cir. 2002) ("[T]he applicant is entitled to habeas corpus relief only if no rational trier of fact could find proof of guilt beyond a reasonable doubt based on the evidence adduced at trial."). The Court must review the evidence in the light most favorable to the prosecution. Ponnapula, 297 F.3d at 179 (citing Jackson, 443 U.S. at 318). Moreover, the Petitioner bears a "very heavy burden" in convincing a federal habeas court to grant a petition on the grounds of insufficient evidence. Id. (quoting Quirama v. Michele, 983 F.2d 12, 14 (2d Cir. 1993)). Even when "faced with a record of historical facts that supports conflicting inferences [a court] must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Wheel v. Robinson, 34 F.3d 60, 66 (2d Cir. 1994) (quoting Jackson, 443 U.S. at 326). Thus, where there are conflicts in the testimony, a federal habeas court must defer to the jury's resolution of the credibility of the witnesses. See Maldonado

v. Scully, 86 F.3d 32, 35 (2d Cir. 1996); Dismel v. LaValle, No. 11-CV-85, 2013 WL 4775561, at *7 (E.D.N.Y. Sept. 6, 2013).

ii. Application

When considering the sufficiency of the evidence, a federal court looks to state law to determine the elements of the crime. Quartararo v. Hanslmaier, 186 F.3d 91, 97 (2d Cir. 1999); see also Jackson, 443 U.S. at 324. In New York, a person is guilty of felony murder when:

> Acting either alone or with one or more other persons, he commits or attempts to commit . . . rape in the first degree . . . and, in the course of and in furtherance of such crime or of immediate flight therefrom, he . . . causes the death of a person other than one of the participants . . . .

N.Y. Penal Law § 125.25(3). A person is guilty of rape in the first degree when "he or she engages in sexual intercourse with another person by forcible compulsion." N.Y. Penal Law § 130.35.

Considering the elements of felony murder, the record evidence (when viewed in the light most favorable to the prosecution) is legally sufficient for a rational juror to conclude, beyond a reasonable doubt, that Petitioner was guilty of felony murder, with rape in the first degree as the predicate felony. See Jackson, 443 U.S. at 319 (asking, on habeas review, whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.").

A. The Confession

Here, Petitioner admitted during the interrogation that he raped the victim. (Interview Tr. at 36–37, 39.) This itself can be enough to deny a sufficiency challenge raised in a habeas petition. See Farrington v. Senkowski, 214 F.3d 237, 241 (2d Cir. 2000) (upholding a guilty verdict of felony murder beyond a reasonable doubt in light of a petitioner's videotaped statement in which he admitted to attempting to commit robbery). However, construing the Petition liberally, Petitioner contends that his confession was not voluntary because the detectives "employed subtle

techniques to extract admissions from [Petitioner]." (Pet., at 19.) Accordingly, the Court must assess whether the Huntley hearing court properly found that the Confession was voluntary, such that the jury was permitted to consider it in rendering the guilty verdict. (See Huntley Decision at 45–47.)

In assessing the voluntariness of a confession, a court must consider the totality of the surrounding circumstances, including the accused's characteristics and the details of the interrogation. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973); see also Walker v. James, 116 F. App'x 295, 297 (2d Cir. 2004). Some of the factors considered include the age and intelligence of the defendant, whether the defendant was advised of his constitutional rights, the length of the detention, whether the questioning was prolonged, the conduct of law enforcement officials, and whether there was physical punishment such as the deprivation of food or sleep. See id.

There is no dispute that Petitioner was advised of his Miranda rights in advance of making any statements to the detectives. (Trial Tr. II, ECF No. 4-18, 429:2–18, 432–33:2–11.) Moreover, Petitioner was read his rights and questioned in his native language of Spanish.[6] (Id. at 433:9–11, 437:22–24, 511:16–20.) During the recorded interrogation, Petitioner, who was twenty-one-years-old at the time, was the first to tell the detectives that he led the victim to the parking lot behind Sabor Latino. (Interview Tr. at 25–26.) Without being prompted, he mapped out exactly how he led the victim to the rear of the parking lot. (Id. at 68–70.) Additionally, when Detective Serrata asked how Petitioner killed the victim, Petitioner said, "with the belt," and demonstrated to the

[6] Although there was some testimony regarding a dialect also spoken by Petitioner, no evidence was adduced showing that Petitioner's was unable to speak and understand the Spanish spoken by Detective Serrata. (See Trial Tr. I, ECF No. 4-17, 393:19–25, 407:9–17; see also Huntley Hearing, ECF No. 4-15.) Additionally, Petitioner, was assisted by a Spanish interpreter throughout the trial. (See Trial Tr. I, ECF No. 4-17; Trial Tr. II, ECF No. 4-18.) Most critically, Petitioner does not contend in his Petition that he was unable to speak or understand Spanish. (See Pet., at 24.)

detectives how he looped his belt around the victim's neck. (Id. at 32.) When asked further if he penetrated the victim, he answered in the affirmative. (Id. at 39.) Petitioner at first claimed that after raping the victim, he put her pants on. (Id. at 34, 70.) However, when the detectives indicated that this was improbable, Petitioner admitted that he left the victim with her pants down. (Id. at 71.) At the conclusion of the interrogation, Detective Serrata wrote out a statement which he read to the Petitioner in Spanish. (Id. at 98–99.) Petitioner swore to the written statement detailing how he pulled down the victim's pants and forced himself on her before choking her with the belt and leaving her dead. (Id.; ECF No. 4-5.)

Furthermore, in accordance with the factors considered in Schneckloth, there was no evidence that Petitioner was mistreated or threatened during interrogation. (See Interview Tr.) At no point did Petitioner ask for a lawyer. (Id.) During the course of the interrogation, Petitioner was given water. (Id. at 2, 78, 122.) He was offered a bathroom break on multiple occasions and used the bathroom at one point. (Id. at 2, 62, 78, 99, 103, 117, 121.) He was also given coffee and a sandwich while in the interrogation room. (Id. at 123.) At the end of the interrogation, Petitioner was permitted to and did speak to his father on the phone, and Detective Serrata offered for him to call whomever else he wanted. (Id. at 122.) Thus, the state court's determination that Petitioner's statements were voluntary and admissible was neither contrary to, nor an unreasonable application of, clearly established federal law, nor was it an unreasonable determination of the facts in light of the record.[7]

[7] As Petitioner raised the exact same arguments in his direct appeal, the Appellate Division presumably considered whether Petitioner's Confession was appropriately considered by the jury in rendering its decision regarding the legal sufficiency of the evidence. Thus, the state court's conclusion that Petitioner's confession was voluntary is entitled to AEDPA deference. Even assuming, arguendo, that the Appellate Division did not consider the voluntariness of Petitioner's oral and written statements in a merits determination of the legal sufficiency question, a de novo review of the record by the Court still renders the Confession voluntary.

B. Corroborating Evidence

Petitioner's sworn Confession is further corroborated by physical evidence. The victim was found with her pants and underwear around her ankles. (Trial Tr. I, ECF No. 4-17, 33:22–34:2–10, 47:16–18.) Petitioner's DNA was found under the victim's fingernails, and the Petitioner had scratches down his arms upon his arrest, which the Medical Examiner testified likely occurred at the time of the victim's death. (Id. at 83–86; Trial Tr. II, ECF No. 4-18, 645:8–22, 651:14–21, 656–57.) The blunt force trauma to the victim's neck, back, and head, further corroborates Petitioner's admission of a physical struggle that ensued during the rape before he choked her with his belt. (Interview Tr. at 41; Trial Tr. II, ECF No. 4-18, 560:2–24, 561:7–12.) This physical corroboration of Petitioner's oral and written statements is more than enough for a reasonable juror to find that Petitioner committed or attempted Rape in the First Degree (N.Y. Penal Law § 130.35) beyond a reasonable doubt, and then in the course of that crime, caused the victim's death (N.Y. Penal Law § 125.25). See Williams v. Bradt, No. 10-CV-2858, 2012 WL 2914892, at *8 (E.D.N.Y. July 17, 2012) (finding that a petitioner's written and oral admissions made during interrogation, coupled with other substantial confirming evidence, were sufficient to uphold a felony murder conviction beyond a reasonable doubt); see also Gruttadauria v. Conway, No. 09-CV-4258, 2013 WL 5507145, at *7 (E.D.N.Y. Sept. 30, 2013) (upholding, on habeas review, a jury's determination of petitioner's guilt of robbery beyond a reasonable doubt in light of the petitioner's confession and corroborating circumstantial evidence).

In light of the evidence presented at trial, a rational juror could have readily concluded that Petitioner was guilty of Felony Murder (N.Y. Penal Law § 125.25(3)) beyond a reasonable doubt. When viewing the evidence in the light most favorable to the prosecution, Petitioner has failed to satisfy the "heavy burden" of showing that the evidence adduced at trial was insufficient to support

his conviction. See Ponnapula, 297 F.3d at 179. Therefore, the state court's decision was neither contrary to, nor an unreasonable application of, clearly established federal law, nor was it an unreasonable determination of the facts in light of the record. Thus, Petitioner's claim challenging the legal sufficiency of the evidence is meritless and hereby denied.

III. CONCLUSION

For the foregoing reasons, Petitioner has demonstrated no basis for relief under 28 U.S.C. § 2254. Accordingly, the Petition is DENIED. A certificate of appealability shall not issue because Petitioner has failed to make a substantial showing of a denial of a constitutional right. See 28 U.S.C. § 2253(c)(2). I certify that any appeal of this Order would not be taken in good faith, and thus in forma pauperis status is denied for the purposes of any appeal. Coppedge v. United States, 369 U.S. 438, 444–45 (1962). The Clerk of this Court is respectfully directed to mail a copy of this Order to the pro se Petitioner and to close this case.

SO ORDERED.

Dated: July [xx], 2019
Central Islip, New York

_____
JOAN M. AZRACK
UNITED STATES DISTRICT JUDGE

Applicant Details

First Name	**Warren**
Last Name	**Chu**
Citizenship Status	**U. S. Citizen**
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Applicant Education

BA/BS From	**University of California-Los Angeles**
Date of BA/BS	**June 2017**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**April 27, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Law & the Arts**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Harlan Fiske Stone Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**

Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

February 23, 2022

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

I am a recently graduated Columbia Law School alum. I write to apply for a clerkship in your chambers beginning in 2023 or any term thereafter.

Enclosed please find a resume, transcript, and writing sample. My writing sample is the appellate brief I wrote for the Harlan Fiske Stone Moot Court. Also enclosed are letters of recommendation from Professor Bert Huang (212-854-8334, bhuang@law.columbia.edu), Christopher Harwood (212-880-9547, charwood@maglaw.com), and Professor Gillian Metzger (212-854-2667, gmetzg1@law.columbia.edu).

Please let me know if I can provide any additional information. I can be reached by phone at 626-378-7046 or by email at warren.chu@columbia.edu. Thank you for your consideration.

Respectfully,

Warren Chu

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EDUCATION

Columbia Law School, New York, NY
Juris Doctor, received May 2021
Honors: Butler Fellowship (Half-Tuition Merit Scholarship)
James Kent Scholar, Harlan Fiske Stone Scholar
Activities: *Columbia Journal of Law & the Arts*, Articles and Notes Editor
Research Assistant and Teaching Fellow for Professor Gillian Metzger (Federal Courts, Fall 2020)
Teaching Fellow for Professor Doron Teichman (Criminal Law, Spring 2020)
Asian Pacific American Law Students Association, 1L Representative; Social Chair
California Society, VP of Events
Publications: *WADA Time to Choose a Side: Reforming the Anti-Doping Policies in U.S. Sports Leagues While Preserving Players' Rights to Collectively Bargain*, 44 COLUM. J.L. & ARTS 209 (2021)

University of California, Los Angeles, Los Angeles, CA
Bachelor of Arts in Political Science, *cum laude*, received June 2017
Minor: Film, Television, and Digital Media

EXPERIENCE

Patterson Belknap Webb & Tyler LLP, New York, NY
Litigation Law Clerk September 2021 – Present
Conducting deposition defense and creating preparation materials in a legal malpractice case. Advising on strategy in an SEC enforcement action. Working with pro bono clients in U-Visa immigration cases.

National Public Radio, Washington, D.C.
Office of the General Counsel Intern September 2020 – December 2020
Conducted legal research on data privacy and prepared legal memoranda, contracts, and other legal documents.

Boies Schiller Flexner LLP, New York, NY
Summer Associate (offer extended) May 2020 – July 2020
Assisted with reply brief regarding arbitration jurisdiction. Researched sanctions for potential spoliation of evidence in ongoing employment litigation.

Hon. Margo K. Brodie, U.S District Court for the Eastern District of New York, Brooklyn, NY
Judicial Intern May 2019 – July 2019
Assisted judicial clerks with research on substantive and procedural issues for upcoming litigation. Drafted legal memoranda. Observed court proceedings.

Manatt, Phelps & Phillips LLP, Los Angeles, CA
Conflicts/Intake Clerk May 2017 – July 2018
Completed intake forms for new business for professionals from every Manatt firm around the country. Drafted and completed engagement letters, waivers, and disclosures for professionals to send to clients.

Congresswoman Judy Chu, U.S. House of Representatives, Washington, D.C.
Staff Intern September 2016 – December 2016
Assisted in the research and drafting of responses to pending legislation. Helped organize meetings for the Congressional Asian Pacific American Caucus (CAPAC).

INTERESTS: Jeopardy!, Los Angeles Lakers, Philadelphia Eagles, science fiction, tennis

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Program: Juris Doctor

Warren Chu

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6429-1	Federal Criminal Law	Richman, Daniel	3.0	A-
L6610-2	Journal of Law and the Arts Editorial Board		1.0	CR
L6274-2	Professional Responsibility	Kent, Andrew	2.0	CR
L8084-1	S. Asian American History and the Law	Ishizuka, Nobuhisa	1.0	CR
L8819-1	S. Public Law Workshop	Bulman-Pozen, Jessica; Metzger, Gillian	2.0	B+
L8661-1	S. Supreme Court	Allon, Devora Whitman; Lefkowitz, Jay	2.0	B+
L6683-1	Supervised Research Paper	Mavroidis, Petros C.	1.0	A-

Total Registered Points: 12.0

Total Earned Points: 12.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-1	Evidence	Shechtman, Paul	3.0	A
L6610-2	Journal of Law and the Arts Editorial Board		1.0	CR
L6169-2	Legislation and Regulation	Kessler, Jeremy	4.0	B+
L6680-1	Moot Court Stone Honor Competition	Richman, Daniel; Strauss, Ilene	0.0	CR
L6685-1	Serv-Unpaid Faculty Research Assistant	Metzger, Gillian	1.0	CR
L6695-1	Supervised JD Experiential Study	Huang, Bert	3.0	CR
L6822-1	Teaching Fellows	Metzger, Gillian	3.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

Spring 2020

Due to the COVID-19 pandemic, mandatory Credit/Fail grading was in effect for all students for the spring 2020 semester.

Course ID	Course Name	Instructor(s)	Points	Final Grade
L8663-1	C. Courts & the Legal Process	Huang, Bert	1.0	CR
L6238-1	Criminal Adjudication	Shechtman, Paul	3.0	CR
L6610-1	Journal of Law and the Arts		0.0	CR
L6675-1	Major Writing Credit	Mavroidis, Petros C.	0.0	CR
L6683-1	Supervised Research Paper	Mavroidis, Petros C.	2.0	CR
L6822-1	Teaching Fellows	Teichman, Doron	3.0	CR
L6701-1	The Media Industries: Public Policy and Business Strategy	Knee, Jonathan; Wu, Timothy	3.0	CR
L6484-1	Trademarks	Beebe, Barton	3.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

Fall 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6341-1	Copyright Law	Wu, Timothy	3.0	A
L6425-1	Federal Courts	Metzger, Gillian	4.0	A
L6205-1	Financial Statement Analysis and Interpretation	Bartczak, Norman	3.0	A
L6610-1	Journal of Law and the Arts		0.0	CR
L8609-1	S. Fighting Corruption in Sports [Minor Writing Credit - Earned]	Mavroidis, Petros C.; Rodgers, Jennifer	2.0	A

Total Registered Points: 12.0

Total Earned Points: 12.0

Spring 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6133-2	Constitutional Law	Barenberg, Mark	4.0	A-
L6108-2	Criminal Law	Scott, Elizabeth	3.0	A-
L6679-1	Foundation Year Moot Court	Strauss, Ilene	0.0	CR
L6369-1	Lawyering for Change	Sturm, Susan P.	3.0	A-
L6121-29	Legal Practice Workshop II	Harwood, Christopher B	1.0	P
L6118-1	Torts	Liebman, Benjamin L.	4.0	A-

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-3	Legal Methods II: Empirical Methods	Holden, Richard	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2018

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-4	Civil Procedure	Huang, Bert	4.0	A
L6105-5	Contracts	Dari-Mattiacci, Giuseppe	4.0	B+
L6113-1	Legal Methods	Ginsburg, Jane C.	1.0	CR
L6115-29	Legal Practice Workshop I	Harwood, Christopher B; Neacsu, Dana	2.0	HP
L6116-1	Property	Merrill, Thomas W.	4.0	B+

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 85.0

Total Earned JD Program Points: 85.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2020-21	Harlan Fiske Stone	3L
2019-20	James Kent Scholar	2L
2018-19	Harlan Fiske Stone	1L

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	1.0

University of California, Los Angeles
UNDERGRADUATE Student Copy Transcript Report

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This is an **unofficial/student copy** of an academic transcript and therefore does not contain the university seal and Registrar's signature. Students who attempt to alter or tamper with this document will be subject to disciplinary action, including possible dismissal, and prosecution permissible by law.

Student Information

Name: CHU, WARREN
UCLA ID: 604290413
Date of Birth: 10/05/XXXX
Version: 08/2014 | SAITONE
Generation Date: January 03, 2019 | 07:58:02 PM
This output is generated only once per hour. Any data changes from this time will be reflected in 1 hour.

Program of Study

Admit Date: 09/23/2013
COLLEGE OF LETTERS AND SCIENCE

Major:
POLITICAL SCIENCE

Minor:
FILM, TELEVISION, AND DIGITAL MEDIA

Degrees | Certificates Awarded

BACHELOR OF ARTS Awarded June 16, 2017
in POLITICAL SCIENCE
With a Minor in FILM, TELEVISION, AND DIGITAL MEDIA
Cum Laude

Secondary School

MONROVIA HIGH SCHOOL, June 2013

University Requirements

Entry Level Writing	satisfied
American History & Institutions	satisfied

California Residence Status

Resident

Transfer Credit

Institution		Psd
ADVANCED PLACEMENT	1 Term to 10/2013	48.0

Fall Quarter 2013

Major:
PREPOLITICAL SCIENCE

INTRO TO EARTH SCI	E&S SCI 1	5.0	18.5	A-
AMERICA 1954-1974	GE CLST 60A	6.0	24.0	A
WORLD POLITICS	POL SCI 20	5.0	18.5	A-

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	16.0	16.0	61.0	3.813

Winter Quarter 2014

DINOSAURS&RELATIVES	EPS SCI 17	5.0	15.0	B
AMERICA 1954-1974	GE CLST 60B	6.0	19.8	B+
HOLOCAUST-FILM&LIT	GERMAN 59	5.0	20.0	A

	Atm	Psd	Pts	GPA
Term Total	16.0	16.0	54.8	3.425

Spring Quarter 2014

AMERICA 1954-1974	GE CLST 60CW	6.0	22.2	A-
Honors Content Writing Intensive				
POLITICS & STRATEGY	POL SCI 30	5.0	20.0	A
INTRO-AMERICN PLTCS	POL SCI 40	5.0	16.5	B+

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	16.0	16.0	58.7	3.669

Fall Quarter 2014

INTR-POLITCL THEORY	POL SCI 10	5.0	18.5	A-
INTRO PSYCHOBIOLOGY	PSYCH 15	4.0	13.2	B+
INTRO-STAT REASON	STATS 10	5.0	20.0	A

	Atm	Psd	Pts	GPA
Term Total	14.0	14.0	51.7	3.693

Winter Quarter 2015

Major:
POLITICAL SCIENCE

POLITICS&THRY&FILM	POL SCI 113B	4.0	16.0	A
INTL POLT 1914-PRES	POL SCI 138B	4.0	14.8	A-
EVOL-AMER REGULATRY	POL SCI 147C	4.0	16.0	A

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	12.0	12.0	46.8	3.900

Spring Quarter 2015

HIST AM MOTION PIC	FILM TV 106A	6.0	22.2	A-
DIVERSITY&DEMOCRACY	POL SCI 115D	4.0	16.0	A+
POLITICAL PARTIES	POL SCI 142A	4.0	16.0	A+

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	14.0	14.0	54.2	3.871

Summer Sessions 2015

WRLD PLTCS-W EUROPE	POL SCI 127A	4.0	16.0	A
W EUROPE GOVT&PLTCS	POL SCI 153A	4.0	16.0	A

	Atm	Psd	Pts	GPA
Term Total	8.0	8.0	32.0	4.000

Fall Quarter 2015

SCREENWRTNG FNDMTLS	FILM TV 133	4.0	16.0	A
ELEMENTARY FRENCH	FRNCH 1	4.0	14.8	A-
CRISIS DECSN MAKING	POL SCI 139	4.0	16.0	A

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	12.0	12.0	46.8	3.900

Winter Quarter 2016

FILM AUTHORS	FILM TV 113	5.0	16.5	B+
ELEMENTARY FRENCH	FRNCH 2	4.0	16.0	A
ANGLO-AM LEGAL SYST	POL SCI 145A	4.0	16.0	A
POLITICS & POLICY	UG-LAW 183	1.0	0.0	P

	Atm	Psd	Pts	GPA
Term Total	14.0	14.0	48.5	3.731

Spring Quarter 2016

FILM EDITING	FILM TV 122D	4.0	16.0	A+
FILM & TV DIRECTING	FILM TV 122M	4.0	16.0	A
ELEMENTARY FRENCH	FRNCH 3	4.0	0.0	P
PLTCS IN MIDLE EAST	POL SCI 157	4.0	16.0	A

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	16.0	16.0	48.0	4.000

Fall Quarter 2016

CAPPP WASHINGTN SEM	POL SCI M191DC	8.0	29.6	A-
WASHDC INTERNSHIP	POL SCI M195DC	4.0	0.0	P

	Atm	Psd	Pts	GPA
Term Total	12.0	12.0	29.6	3.700

Winter Quarter 2017

CONSPIRACY THEORIES	COMM ST 105	4.0	16.0	A
PRSPCTVS-DSBLTY STD Writing Intensive	DIS STD 101W	5.0	20.0	A
FILM&TV DEVELOPMENT	FILM TV 183A	4.0	14.8	A-

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	13.0	13.0	50.8	3.908

Spring Quarter 2017

FREE SPEECH-WORKPLC	COMM ST M172	4.0	16.0	A+
ANIMATION-US FLM&TV	FILM TV 122N	5.0	18.5	A-
POLITICS-TRUMP ERA	POL SCI 186	4.0	16.0	A

Dean's Honors List

	Atm	Psd	Pts	GPA
Term Total	13.0	13.0	50.5	3.885

UNDERGRADUATE Totals

	Atm	Psd	Pts	GPA
Pass/No Pass Total	9.0	9.0	N/a	N/a
Graded Total	167.0	167.0	N/a	N/a
Cumulative Total	176.0	176.0	633.4	3.793

Total Non-UC Transfer Credit Accepted	48.0
Total Completed Units	224.0

END OF RECORD
NO ENTRIES BELOW THIS LINE

February 23, 2022

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

I am writing to recommend Warren Chu, a recent graduate of Columbia Law School, for a clerkship in your chambers. Warren is a very smart and thoughtful law student with a strong academic record here at Columbia. I think he has the makings of an excellent law clerk, and I recommend him enthusiastically.

I first met Warren the fall of his 2L year, when he took Federal Courts with me. He did extremely well, earning a straight A in the course. He wrote a very strong exam that put him in the top group of the class, all the more impressive given that he took the class as a 2L. Warren's participation in class was also impressive. He not only provided correct and clear answers to my questions when on call, but offered thoughtful comments in broader discussions that revealed a good grasp of the material and tensions among different lines of case law. Warren's strong performance in Federal Courts holds true across his time at Columbia. His transcript is impressive, with no grade below a B+ and a transcript that is largely As and A-s.

Given Warren's strong performance in Federal Courts, I was very pleased when he agreed to TA the course the next fall. Warren's help was invaluable as I transitioned the course to a hybrid and on-line format. I particularly appreciated his constant willingness to take on new tasks at the last-minute and his handling of the technological aspects of class. He also provided me with excellent research assistance, doing a deep dive into the jurisprudence of Justice Ginsburg for a memoriam piece I wrote on the Justice. Warren is also took the Public Law Workshop with me and Professor Bulman-Pozen, which this year is focused on the presidency. Though not a frequent volunteer, Warren has made valuable contributions to the class discussion.

Finally, throughout his time at Columbia Law School I've had many occasions to interact with Warren, in office hour meetings and more informally as we worked on putting together AV material for Fed Courts. He is always upbeat and helpful, and I've found working with him to be a pleasure. I am sure he would be a welcome addition to chambers.

Please do not hesitate to reach out to me if there is any further information on Warren I can provide.

Very truly yours,

Gillian E. Metzger

Gillian Metzger - gmetzg1@law.columbia.edu

February 23, 2022

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

I am writing with great enthusiasm to recommend our recent graduate, Warren Chu. He came to Columbia Law School on a merit scholarship, and in his 2L year, he was named a Kent Scholar, which is our highest honors designation. In the fall semester of that year, just before the pandemic, Warren earned straight A's in four courses on widely varying topics, including in a highly competitive Federal Courts course taught by Professor Gillian Metzger.

Warren is genuine, warm, down-to-earth, and mature—and you can tell from his eyes when his curiosity is piqued and his keen mind is at work on something you've just said. I first got to know him from teaching his Civil Procedure course, where his top-flight exam came as no surprise given his crystal-clear and always on-point answers to cold calls. And in a seminar he also took with me, I could count on Warren to raise sharply reasoned and insightful questions.

That seminar had a somewhat unusual format: for each session, I invited a pair of guest speakers—a professor presenting a new research paper, and a judge acting as the discussant on that paper. In a discussion with a law-and-psychology professor who was presenting a new experimental study about the potential emotional impact of gruesome photographic evidence, Warren noticed that the study had not varied the race of the defendant, a classic factor in such research on juror perceptions. It did make sense to try (as the study did) to test for any psychological effects of the race of the victim in the crime-scene photographs, Warren observed; but when it came to testing the power of curative instructions, he said, it would be remiss not to also experimentally vary the race of the defendant (and to analyze the interactions between both variables) because those effects could easily swamp the more subtle psychological mechanisms by which the tested instructions might dampen a subject's unconscious biases.

Warren's suggestion was a very sophisticated intervention on the researcher's own terms, one that came from a careful analysis of the background literature we had discussed as preparatory readings—and one that the author agreed would need to be taken into account as her research project continues. Moreover, Warren then followed up with a further question, one that showed his facility in smoothly shifting between scanning for devils in the details and a higher-level perspective: If those further experiments were to show that the specified curative instructions were not as effective on some subjects as one might have hoped (perhaps due to the effects of the race of the defendant), he asked, then what other practical solutions might be possible? This was just the sort of challenging question that pushes a research agenda forward—in this case, pressing the author to consider what other interventions should be tested in the study, with an eye to real policy consequences. Having questions like this come up is the very reason I invite researchers to present their works-in-progress to our students, and why they find it rewarding.

I hope you'll find the chance to speak with Warren, as I think you'll enjoy the conversation. He would be an excellent law clerk and a well-liked, highly collegial member of your chambers. Please let me know if I can answer any questions or tell you more. My personal phone is (857) 928-4324 and my email is bhuang@law.columbia.edu. Thank you.

Sincerely,

Bert Huang
Michael I. Sovern Professor of Law
Columbia Law School

February 23, 2022

The Honorable Eric Vitaliano
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 707 S
Brooklyn, NY 11201-1818

Dear Judge Vitaliano:

I write in enthusiastic and unqualified support of Warren Chu's application for a clerkship in your chambers. I had the pleasure of having Mr. Chu as a student in my year-long Legal Practice and Writing course during his first year at Columbia, where he excelled. I have since kept in touch with Mr. Chu and watched him continue to excel. He has the tools and temperament to be an exceptional clerk. If given the opportunity, he will not disappoint.

With respect to his legal research and writing, Mr. Chu's performance in my class was exceptional. That Mr. Chu is a superior writer was immediately apparent to me, as even his initial written work required minimal editing, which, in my experience, is unique for a first-year law student. During the first semester of my class—which focuses on legal research and writing—Mr. Chu earned a high pass, which I reserve for the best one or two students in the class. In fact, Mr. Chu was the best researcher and writer in the class, and is among the top students I have ever taught. Mr. Chu's legal memoranda always were well-organized, proceeding from point to point in a clear, concise, and logical way. Having seen a significant amount of written work from Mr. Chu, I can say with great confidence that he will develop into a first-rate written advocate.

Mr. Chu also performed extremely well in connection with the oral advocacy component of my class. The clarity and structure that Mr. Chu brought to his written work carried over to his oral advocacy. Mr. Chu's excellent performance during his oral arguments could only have come from taking the time to learn the record, think through the likely questions he would face, and fashion compelling points to make in response. Mr. Chu also was quick on his feet, deftly handling questions that would have been difficult to predict.

In addition, Mr. Chu was a valuable participant in class. He always seemed to have something constructive to contribute to the discussion. Equally important, Mr. Chu was respectful of his fellow classmates and their points of view. He is easy to talk to, and I always enjoyed our after-class discussions.

Having kept in touch with Mr. Chu, I am aware that, during his second year, he has gained important extracurricular experience while not letting his grades slip. As a member of the Journal of Law & the Arts, Mr. Chu wrote a note that was selected for publication (which was no surprise to me), and he secured a coveted position on the editorial board for next year (also no surprise).

Having gotten to know Mr. Chu and his work, I am certain that he would be a valuable addition to your chambers. Please do not hesitate to contact me if I may be of further assistance in your consideration of Mr. Chu's application.

Respectfully submitted,

/s/ Christopher B. Harwood
Christopher B. Harwood

Christopher Harwood - charwood@maglaw.com

WRITING SAMPLE

This writing sample is the appellate brief I wrote in Fall 2020 for the Harlan Fiske Stone Moot Court. I wrote and edited this brief without any outside assistance. I have removed sections written by my partner.

The case involved the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which created the Paycheck Protection Program ("PPP") and authorized banks to process PPP loans for the government. Relator-Appellant Tanya Moore, a Commercial Loan Officer for Confluence Bank, alleged that Confluence was certifying false loan applications to the government. Ms. Moore filed a False Claims Act *qui tam* action against Confluence Bank, which the United States government then moved to intervene and dismiss.

I represented the Relator-Appellant Tanya Moore against the United States government. The case was initially brought in the Northern District of Texas where the court granted a motion to dismiss for the government. My client appealed to the Fifth Circuit.

The question presented here was what standard of review should apply when the government moves to dismiss *qui tam* suits under the False Claims Act, 31 U.S.C. §§ 3729, and how the Relator-Appellant would fare under the different standards.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE GOVERNMENT WAS ENTITLED TO DISMISS RELATOR'S CLAIMS UNDER § 3730(c)(2)(A) BECAUSE THE GOVERNMENT FAILED TO DEMONSTRATE A "VALID GOVERNMENT PURPOSE" THAT IS RATIONALLY RELATED TO DISMISSAL

Under the False Claims Act ("FCA"), the Government has the right to dismiss a relator's *qui tam* action notwithstanding the relator's objections, provided the relator is given notice and the opportunity for a hearing. *See* 31 U.S.C. § 3730(c)(2)(A). However, the FCA is silent on the standard of review a court should adopt when reviewing the government's decision to dismiss. The Fifth Circuit has not yet ruled on this issue, but the Ninth and D.C. Circuits have developed two standards that have guided courts in deciding motions to dismiss under § 3730(c)(2)(A). *Compare United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998), with *Swift v. United States*, 318 F.3d 250 (D.C. Cir. 2003). The *Swift* standard is inapplicable in this case. Instead, this Circuit should follow the Ninth Circuit's *Sequoia Orange* standard because it is consistent with precedent and adheres to canons of statutory interpretation.

In *Sequoia Orange*, the Ninth Circuit held that under § 3730 (c)(2)(A), the government must satisfy a two-step test to justify dismissal: "(1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose." 151 F.3d at 1145. If the government satisfies the test, the burden shifts to the relator to "demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." *Id.* (internal citations omitted). On the other hand, in *Swift*, the D.C. Circuit held that the FCA granted the government "an unfettered right to dismiss" *qui tam* FCA actions without the possibility of judicial review. 318 F.3d at 252.

This Court reviews a district court's interpretation of the FCA and its determination of the proper standard of review *de novo*. *See United States v. Hegwood*, 934 F.3d 414, 417 (5th

Cir. 2019) (stating that review of the meaning of a federal statute is *de novo*). The district court erred in its application of both standards. *Swift* relies on an interpretation of Federal Rule of Civil Procedure 41(a)(1)(i) that is inapplicable in the instant case, so the district court should have declined to apply it. *See Swift*, 318 F.3d at 253. Additionally, under *Sequoia Orange*, because the Government failed to adequately investigate Relator's claims, it cannot establish that dismissal is rationally related to a valid government purpose. *See* 151 F.3d at 1145.

A. The *Swift* standard should not and does not apply in this action

In *Swift*, the D.C. Circuit read § 3730(c)(2)(A) "to give the government an unfettered right to dismiss an action," which would serve to prevent a court from reviewing the government's decision. 318 F.3d at 252. The *Swift* court based its interpretation of the statute in part on the Federal Rules of Civil Procedure ("FRCP"), noting that Rule 41(a)(1)(i) allows a plaintiff to unilaterally dismiss a civil action without judicial review if the adverse party has not yet filed an answer or a motion for summary judgment. *Id.*; Fed. R. Civ. P. 41(a)(1)(i). The *Swift* court believed that its interpretation of § 3730(c)(2)(A) aligned with Rule 41(a)(1)(i) since the Government was an intervenor-plaintiff and should thus be permitted to unilaterally dismiss the action without judicial review. *Swift*, 318 F.3d at 252.

The *Swift* standard may seem convincing on its face, but its reliance on Rule 41(a)(1) serves to disqualify it from application in the instant case. The Defendants' motion to dismiss, filed two days before the Government filed its motion to dismiss, was converted into a motion for summary judgment once the district court relied upon the Government's exhibit, a matter outside of the pleadings. Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."). Because Defendants' converted motion for summary judgment was filed before any plaintiff filed a motion to dismiss, the right to unilaterally dismiss without judicial review was extinguished. Fed. R. Civ. P. 41(a)(1)(i).

As such, if this Court were to follow *Swift*'s rationale that "unfettered dismissal" finds its justification from Rule 41(a)(1)(i), then this Court should decline to apply the *Swift* standard. *Swift*, 318 F.3d at 252.

Even if conversion did not occur, this Court should decline to follow the *Swift* standard because by improperly converting the judicial hearing required by § 3730(c)(2)(A) into a "formal opportunity to convince the government not to end the case," it violates a basic canon of statutory interpretation.[1] *Swift*, 318 F.3d at 253; *see Corley v. United States*, 556 U.S. 303, 314 (2009) ("[O]ne of the most basic interpretive canons [is] that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .'") (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

1. The district court's consideration of matters outside of the pleadings converted Defendants' motion to dismiss into a motion for summary judgment, which prevents the Government from dismissing the case under *Swift*'s reasoning

Due to *Swift*'s reliance on Rule 41(a)(1)(i), it is inapplicable in the instant case. Rule 41(a)(2) dictates that if a defendant has been served and has either answered or filed a motion for summary judgment, then the action may be dismissed by the plaintiff "only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). The *Swift* court, as well as other courts that have relied upon Rule 41(a)(1)(i) to support the government's right to dismiss, considered cases that fall under Rule 41(a)(2) and explicitly noted that they may not fall within

[1] Some trial courts have claimed that dicta from previous Fifth Circuit cases indicate that the Fifth Circuit would follow *Swift*. *See, e.g.*, *United States ex rel. Vanderlan v. Jackson HMA, LLC*, No. 3:15-CV-767-DPJ-FKB, 2020 WL 2323077, at *5 (S.D. Miss. May 11, 2020) ("the Fifth Circuit has at least foreshadowed, en banc, that *Swift* got it right"); *U.S. ex rel. Nicholson v. Spigelman*, No. 10-cv-3361, 2011 WL 2683161, at *1 (N.D. Ill. July 8, 2011) ("Dicta from the Fifth Circuit is in accord [with *Swift*]."). However, this incorrect conclusion is based on two lines, one from *Searcy v. Philips Elecs. N. Am. Corp.*, which stated that "[a]pparently, a relator 'conducts' an action even though the government retains the power to take the more radical step of unilaterally dismissing the defendant" and one from *Riley v. St. Luke's Episcopal Hosp.,* which said "the powers of a *qui tam* relator to interfere in the Executive's overarching power to prosecute and to control litigation are seen to be slim indeed when the *qui tam* provisions of the FCA are examined in the broad scheme of the American judicial system." *Searcy*, 117 F.3d 154, 160 (5th Cir. 1997); *Riley*, 252 F.3d 749, 756 (5th Cir. 2001). This is hardly conclusive evidence that the Fifth Circuit "foreshadowed" that *Swift* was correctly decided. It is, first and foremost, dicta, and second, decided years before *Swift* had even come down.

the scope of their decisions. *See Swift*, 318 F.3d at 252–53 ("If the government tried to have an action dismissed after the complaint had been served and the defendant answered, it might be subject to Rule 41(a)(2)."); *United States v. UCB, Inc.*, 970 F.3d 835, 850 (7th Cir. 2020) ("Not every case, though, will be like this one. For example, if the conditions of Rule 41(a)(2) do not apply, an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper.") (internal quotations omitted).

While Defendants neither answered nor filed a motion for summary judgment, the Government filed a motion to dismiss two days after the Defendants' filed their motion to dismiss. Defs. Mot. to Dismiss, R. at 73; Gov. Mot. to Dismiss, R. at 73. Ordinarily, a motion to dismiss is not an action that would prevent a plaintiff from voluntarily dismissing its own claims. *See Carter v. United States*, 547 F.2d 258, 259 (5th Cir. 1977). However, the government attached an exhibit to its motion to dismiss, and the district court considered this exhibit in deciding the merits of the case, thus converting the Defendants' motion to dismiss into a motion for summary judgment under Rule 12(d). Gov. Mot. to Dismiss, R. at 79–81; Fed. R. Civ. P. 12(d). This conversion is consistent with Fifth Circuit precedent, which has held that a 12(b)(6) motion to dismiss is converted into a motion for summary judgment when "the trial court [is] presented with, and [does] not exclude, matters outside the pleadings" and that "[f]or the purposes of Rule 41(a)(1), a converted 12(b)(6) motion to dismiss will be treated as a motion for summary judgment." *Exxon Corp. v. Maryland Cas. Co.*, 599 F.2d 659, 661 (5th Cir. 1979); *see also In re LaChance*, 209 F.3d 720 (5th Cir. 2000) ("We have held that for purposes of Rule 41, a Rule 12(b)(6) motion becomes a motion for summary judgment unless all extraneous material presented is excluded by the court.").

It is true that the Fifth Circuit has established limits on this conversion, namely that the district court must have actually relied on matters outside of the pleadings before the appellate court should convert a motion to dismiss. *See Sigaran v. U.S. Bank Nat. Ass'n*, 560 F. App'x

410, 415 (5th Cir. 2014) ("The mere presence of those documents in the record, absent any indication that the district court relied on them, does not convert the motion to dismiss into a motion for summary judgment."); *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 283 (5th Cir. 1993). However, in this case, the district court below did not just accept the Government's exhibit but actually cited the exhibit in its decision to dismiss on the standard of review issue *and* the merits issues. D. Ct. Order, R. at 97 (referring to Government exhibit to "take the point that some employees acted with unclear intents and potentially base motives"). There is hardly a clearer signal of reliance than an actual citation to the source.

As such, "appellate courts may take the district court's consideration of matters outside the pleadings to trigger an implicit conversion." *Trinity Marine Products, Inc. v. United States*, 812 F.3d 481, 487 (5th Cir. 2016) (internal citations and quotations omitted). This implicit conversion can occur without notice to the parties, so long as they were aware that the court *could* treat the motion to dismiss as a motion for summary judgment by considering matters outside of the pleadings. *Isquith ex rel. Isquith v. Middle S. Utils., Inc.*, 847 F.2d 186, 195 (5th Cir. 1988); *see also Clark v. Tarrant Cty., Texas*, 798 F.2d 736, 746 (5th Cir. 1986).

Because the district court considered matters outside of the pleadings while ruling on Defendants' motion to dismiss on the merits, Defendants' motion to dismiss was retroactively converted to a motion for summary judgment for purposes of Rule 41(a)(1). *See Berry v. ADT Sec. Servs., Inc.*, No. 4:19-CV-24, 2019 WL 6002257, at *3 (S.D. Tex. June 24, 2019) ("[O]nce the court considers outside material in ruling on the motion to dismiss, the motion is treated as a summary judgment motion and the effect goes back to the filing of the motion, thus barring the plaintiff's right to a Rule 41(a)(1) dismissal without prejudice."). The Government filed its motion to dismiss two days after Defendants' converted motion for summary judgment, so Rule 41(a)(2) establishes limits on a plaintiff's voluntary dismissal and Rule 41(a)(1) would